IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.493 OF 2003

Konkan Railway Corporation Ltd.)
having its Corporate office at)
Belapur Bhavan, Plot No.6,)
Section 11, C.B.D., Belapur,)
Navi Mumbai - 400 614) ..Petitioners.

Vs.

Patel Engineering Company Ltd.)
P.B.Box No.8357, Jogeshwari (W))
Mumbai - 400 102) ..Respondents.

Mrs.Kiran Bagalia with Ms.Asha Bhambwani with Latika Panakshari, Advocate for the Petitioners.

Mr.Aspi Chinoy, Senior counsel with Z.Andhyarujina i/b. M/s.B.Munim & Co., Advocate for the Respondents.

CORAM : S.J.VAZIFDAR, J.

DATE OF RESERVING THE JUDGMENT : 6TH JULY, 2004

DATE OF PRONOUNCING THE JUDGMENT : 19TH AUGUST, 2004

ORAL JUDGMENT :

This is a Petition under section 34 of the Arbitration and Conciliation Act, 1996 to set aside an award dated 19th May, 2003 passed by the Arbitral Tribunal in respect of the disputes and differences between the parties. The award held the Respondent

to be entitled to recover a sum of Rs.3,04,71,013.06 together with interest thereon at 18% per annum.

INTRODUCTION

2. The Respondent invited tenders for the construction of a tunnel in connection with one of its projects. The Petitioner's tender was accepted. An agreement in writing dated 27th November, 1991 for the performance of the work for a total contractual cost of Rs.6,81,02,517/- was entered into between the parties. The work was to be carried out in accordance with the said agreement, the schedule annexed thereto and in conformity with the printed schedule of rates, Special Conditions and the General Instructions which were incorporated therein by clause 5. These documents in turn incorporated other documents including the General Conditions of Contract for works.

The date of commencement of the work was 29th October, 1991 and the scheduled date of completion thereof was 28th April, 1994. The work was not completed by the scheduled date. It was substantially completed on 30th September, 1995. The

Respondent issued a certificate dated 14th March, 1996 which specified the date of completion as 10th March, 1996.

3. The Respondent contended that despite its having completed the work satisfactorily the Petitioner failed to pay various amounts due to it under the contract and made unauthorised deductions from its final bill. The Petitioner having failed to settle the final bill the Respondent by its letter dated 1st July, 1998 requested the Petitioner to refer the disputes to arbitration in accordance with clause 63 of the General Conditions of Contract.

4. I will refer to the arbitration clause shortly. Before doing so however it is necessary to note that the Petitioner having failed to respond to this request the Respondent filed Arbitration Petition No.321 of 1998 in this Court under section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 1996 Act). By an order dated 24th December, 1998 two of the arbitrators were appointed. The two arbitrators then proceeded to appoint the presiding arbitrator. That is how the arbitral tribunal was constituted.

5. The Petitioner applied to the arbitral tribunal to hear its objection regarding the validity of the constitution of the arbitral tribunal as a preliminary issue. The arbitral tribunal by its order dated 8th October, 2002, which has also been challenged in the Petition, rejected the objection and proceeded with the hearing of the reference on merits.

6. Mrs.Bagalia, the learned counsel appearing on behalf of the Petitioner, impugned the order dated 8th October, 2002 and the award in so far as it related to certain claims. The Petitioner's challenge to the award thus falls under two parts. The first relates to the constitution of the arbitral tribunal and the other to some of the claims awarded by the arbitrators.

CHALLENGE TO THE CONSTITUTION OF THE ARBITRAL TRIBUNAL :

7. Mrs.Bagalia contended that the arbitral tribunal

was not constituted in accordance with the provisions of the arbitration clause in the contract. The composition of the arbitral tribunal not being in accordance with the agreement of the parties, the award, she submitted, was liable to be set aside under Section 34(2)(v) of the 1996 Act. The submission is not well founded.

8. Clause 63 of the General Conditions of Contract pertaining to arbitration reads as under :

> **"DEMAND FOR ARBITRATION :**
>
> 63.1.1 In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account, or as to the with-holding by the Corporation of any certificate to which the Contractor may claim to be entitled to, or if the Corporation fails to make a decision within a reasonable time, then and in any such case, save the "excepted matters" referred to in clause 62 of these conditions, the Contractor after 90 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.

63.1.2 The demand for arbitration shall specify the matters which are in question, dispute or difference. Only such dispute(s) or difference(s) in respect of which the demand has been made shall be referred to arbitration and other matters shall not be included in the reference.

63.1.3 If the Contractor does not prefer his specific and final claims in writing, within a period of 90 days of receiving the intimation from the Corporation that the final bill is ready for payment, he will be deemed to have waived his claims and the Corporation shall be discharged and released of all liabilities under the contract in respect of these claims."

ARBITRATION

63.3(a) Matters in question, dispute or difference to be arbitrated upon shall be referred for decision to:-

i) A Sole Arbitrator who shall be an Officer of the Corporation nominated by the Chairman and Managing Director of the Corporation in that behalf in cases where the claim in question is below Rupees Five Lakhs and where the issues involved are not of a complicated nature. The Chairman & Managing Director shall be the sole judge to decide whether or not the issues involved are of a complicated nature.

ii) Two Arbitrators, who shall be Corporation Officers of equal status to be appointed in the manner laid down in Clause 63.3(b) for all claims of Rupees Five Lakhs and above, and for all claims irrespective of the amount or value of such claims if the issues involved are of a complicated nature. The Chairman & Managing Director shall be the sole judge to decide whether the issues are of a complicated nature or not. In the event of the two Arbitrators being divided in their opinions the matter under dispute will be referred to an Umpire to be appointed in the manner laid down in Clause 63.3(b) for his decision.

63.3.(b) For the purposes of appointing two Arbitrators as referred to in Clause 63.3(a)(ii) above, the Corporation will send a panel of more than three names of officers of the appropriate status of the Corporation to the Contractor, who will be asked to suggest a panel of three names out of the list so sent by the Corporation. The Chairman and Managing Director will appoint one Arbitrator out of this panel as the Contractor’s nominee, and then appoint a second Arbitrator of equal status as the Corporation’s nominee either from the panel or from outside the panel ensuring that one of the two Arbitrators so nominated is from the Accounts Department.

> Before entering upon the reference the two Arbitrators shall nominate an Umpire who shall be an officer of the Corporation to whom the case will be referred to in the event of any differences between the two Arbitrators."

9. Mrs.Bagalia submitted that the procedure prescribed in the arbitration clause was admittedly not followed while constituting the arbitral tribunal. There is no dispute that the arbitral tribunal appointed in this case is different from the one that may have been constituted had the procedure prescribed by clause 63.1.1 been followed. That however, by itself, does not answer the question.

10. Admittedly, despite the Respondent's repeated requests the Petitioner failed to act in accordance with clause 63.3(b). By its letter dated 28th July, 1997 the Respondent invoked the arbitration clause and requested the Petitioner to initiate proceedings in terms of clause 63.3. The request was repeated by the Respondent's letters dated 22nd February, 1998 and 1st July, 1998. Despite the aforesaid letters the Petitioner failed and neglected to initiate action in accordance with clause 63 for about a year. It is in these circumstances that the Respondent

ultimately filed an application under section 11(6) requesting Chief Justice and/or his designate to take the necessary measure for securing the appointment of the arbitrators. By the order dated 24th December, 1998, a learned single Judge of this Court, designated by the Chief Justice under the 1996 Act, appointed two of the arbitrators. Considering the nature of the disputes the learned Judge appointed a retired Executive Director of the Madhya Pradesh Electricity Board and a chartered accountant. The order records that the parties had no objection to the appointment of the said two arbitrators on the ground of independence or impartiality. They in turn appointed the presiding arbitrator.

11. The order dated 24th December, 1998 was challenged by the Petitioner by Special Leave Petition No.4311 of 1999. Mrs.Bagalia stated that the Supreme Court, following its earlier judgments, held that an order under section 11 was an administrative order and no appeal therefore lies against such an order. It is apparently for this reason that the Petitioners challenged the constitution of the arbitral tribunal under section 16 of the 1996 Act.

12. Section 11 of the 1996 Act so far as is relevant for this case, reads as under :

> **"11. Appointment of arbitrators.-**
>
> (2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
>
> (6) Where, under an appointment procedure agreed upon by the parties, -
> (a) a party fails to act as required under that procedure; or
>
> (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure ; or
>
> (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,
>
> a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.
>
> (7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.

> (8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to -
>
> (a) any qualifications required of the arbitrator by the agreement of the parties ; and
>
> (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.
>
> (10) The Chief Justice may make such scheme as he may deem
>
> appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him".

13. Mrs.Bagalia contended that the expression "to take the necessary measure" mandates the Chief Justice or his designate compelling the parties to comply with the agreed procedure and nothing more. In the present case therefore, according to her, the order under section 11 could only have compelled the Petitioner to take steps for the appointment of the arbitrators in accordance with clause 63. The Chief Justice or his designate did not have the jurisdiction or the power to appoint arbitrators except strictly in accordance with the arbitral clause.

14. The submission is unfounded. Firstly, it is contrary to the language of section 11. Secondly, even assuming the submission to be well founded the constitution of the arbitral tribunal cannot be faulted for it is not contrary to the provisions of the 1996 Act. While the first aspect is supported by a judgment of the Supreme Court the second is expressly covered by another judgment of the Supreme Court.

15. Section 11(6) comes into operation when the party to the arbitration agreement fails to appoint an arbitrator in accordance with the procedure agreed upon by the parties. Had the legislature intended an order of the nature suggested by Mrs.Bagalia the language and the entire scope of section 11(6) would have been different. There is nothing in the section that either expressly or even impliedly curtails the scope or ambit of the expression "to take the necessary measure". If I were to accept Mrs.Bagalia’s submission I would be adding in section 11(6) after this expression, words to the effect "by compelling the party so failing to comply with the agreed procedure", which I am not entitled to do.

16. The submission is contrary to the judgment of the Supreme Court in *Datar Switchgears Ltd. v. Tata Finance Ltd. (2000) 8 Supreme Court Cases 151*, where it is held that if a party fails to make an appointment within 30 days of the demand by the other party and even till that other party makes an application under section 11 it forfeits its right to make an appointment as per the agreed procedure. The Supreme Court held as under :

> "19. So far as cases falling under Section 11(6) are concerned - such as the one before us - no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. <u>In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not</u>

> forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited." (emphasis supplied)

17. It is thus clear that even if the appointment is not made within the time stipulated, the right to appoint does not get automatically forfeited provided the same is exercised before the other party moves an application under section 11. But, if the appointment is not made within time the right to appoint stands forfeited upon the other party making an application under section 11. Mrs.Bagalia did not dispute this to be the effect of the judgment. She however submitted that the judgment ought not to be considered as binding on me for two reasons.

18. Firstly, she submitted that the question did not arise before the Supreme Court and that the Supreme Court therefore did not really either hear the parties or apply its mind to the question. I am afraid this is an argument which merely requires to

be stated to be rejected. I am unable to understand the basis on which Mrs. Bagalia made the submission. The question squarely arose before and was answered by the Supreme Court. This is clear inter-alia from paragraphs 11 and 18 which are as follows :

> "11. The question then arises whether for purposes of Section 11(6) the party to whom a demand for appointment is made, forfeits his right to do so if he does not appoint an arbitrator within 30 days. Learned Senior Counsel for the appellant contends that even though Section 11(6) does not prescribe a period of 30 days, it must be implied that 30 days is a reasonable time for purposes of Section 11(6) and thereafter, the right to appoint is forfeited. Three judgments of the High Courts from Bombay, Delhi and Andhra Pradesh are relied upon in this connection."
>
> "18. In the present case, the respondent made the appointment before the appellant filed the application under Section 11 but the said appointment was made beyond 30 days. Question is whether in a case falling under Section 11(6), the opposite party cannot appoint an arbitrator after the expiry of 30 days from the date of demand ?"

19. In answering the question whether the right of appointment stands forfeited if made beyond 30 days,

the Supreme Court considered when that right stands forfeited. It did not accept the extreme contention that it stands forfeited on the expiry of 30 days. While arriving at this conclusion the Supreme Court also held that the right would stand forfeited upon the expiry of 30 days and after an application under section 11 is made. I do not understand how then it can be contended that the question was not present to the minds of the learned Judges of the Supreme Court. This was the ratio-decidendi of the judgment. It was most certainly not a casual observation.

20. The contention that the observations of the Supreme Court are at the highest merely obiter does not advance the Petitioner's case either. Even assuming that they are merely obiter-dicta, it is well settled that obiter-dicta of the Supreme Court is binding on the High Courts.

21. This view is also supported by the judgment of the Supreme Court in *G. Ramchandra Reddy and Co. v. Chief Engineer, Madras Zone, Military Engineering Service, AIR 1994 Supreme Court, 2381*. This was a decision under section 20 of the Arbitration Act, 1940. Even in that case which was under section 20

of the 1940 Act, the Supreme Court held that a party not availing of its right to appoint an arbitrator in accordance with an arbitration agreement, would forfeit the power to appoint an arbitrator. The Supreme Court held thus in paragraph 6 :

> "6. Thus when the notice was given to the opposite contracting party to appoint an arbitrator in terms of the contract and if no action had been taken, it must be deemed that he neglected to act upon the contract. When no agreement was reached, even in the court between the parties, the court gets jurisdiction and power to appoint an arbitrator. Even if S.8(a) per se does not apply, notice was an intimation to the opposite contracting party to act upon the terms of the contract and his/its non-availment entails the forfeiture of the power to appoint an arbitrator in terms of the contract and gives right to the other party to invoke the court's jurisdiction under S.20. In the instant case the respondent did not appoint an arbitrator, after the notice was received. The respondent averred in the written statement that it was under consideration. Even before the learned single Judge he did not even state that he was willing to appoint an arbitrator. The learned singled Judge rightly exercised the power under S.20(4) of the Act and appointed the arbitrator. The Division Bench, therefore, was not right in holding that the respondent has

> by giving option to the appellant to agree for appointment of an arbitrator out of the five named persons had left it to the appellant to appoint an arbitrator and allowing appellant to appoint an arbitrator. On the other hand, the appointment of an arbitrator made by the learned single Judge must be deemed to have been approved by us."

The observations in this case apply a fortiorari to a case under section 11(6) of the 1996 Act which confers an express power of appointment on the Chief Justice or his designate in a similar situation.

22. In view of the Petitioner's failure to act in accordance with clause 63 in the appointment of arbitrators, it must be held that it forfeited its right of appointment in accordance with the said clause.

23. In the circumstances, it must also be held that the Petitioner forfeited its right to insist on the appointment in accordance with the procedure prescribed by clause 63. The Petitioner having forfeited its right to the appointment of arbitrators in accordance with the procedure prescribed, the submission that the Chief Justice or his designate under section 11 is nevertheless bound to merely

direct the appointment of the arbitrators in accordance with the agreed procedure, is ex-facie unsustainable. It would be illogical and contrary to common sense to suggest that the party that forfeits its right to the appointment as per the agreed procedure is entitled to have that very right which stands forfeited to be enforced in an application by the other side under section 11.

24. The fallacy of Mrs.Bagalia's submission can be demonstrated by a simple illustration. The Chief Justice or his designate acting under section 11 cannot in any event name the arbitrator even if he were to adopt the procedure under clause 63. He can only direct the party to act in accordance with the procedure. What would happen if that party did not comply with the order ? If I were to accept

Mrs.Bagalia's submission, the answer to the question would be: 'nothing'. This would render section 11(6) redundant. Surely this could not have been the intention of the legislature.

25. To this dilemma, Mrs.Bagalia's contention was that if despite the order under section 11(6)

directing the party to act in accordance with the prescribed procedure a party failed to do so, then on a further application the Chief Justice/ his designate could make an appointment otherwise than in accordance with the agreed procedure. This answer exposes the fallacy in Mrs.Bagalia's principal submission. It establishes that there is no jurisdictional bar to the Chief Justice/his designate making an appointment otherwise than in accordance with the agreed procedure in the first instance itself. Once again, had this been the intention, the section would have been differently worded. The section itself would have provided for both the steps.

26. The fallacy in Mrs.Bagalia's submission arises from confusing the question of the existence of power under section 11(6) with that of the manner of exercise of that power by the Chief Justice/his designate. The Chief Justice/his designate is not bound in the first instance, to appoint the arbitrator/s himself and is entitled to give the party another opportunity of making the appointment in accordance with the agreed procedure. Speaking for myself, I may well afford the party another

opportunity to exercise its right of appointment if I were convinced that there were no circumstances which ought to disentitle it from being given a further chance to make an appointment as per the agreed procedure. But, that is a question relating to the manner of exercise of jurisdiction and not one relating to the existence of jurisdiction to deny that right. If the Chief Justice or his designate in the first instance itself makes the appointment otherwise than in accordance with the procedure prescribed, it cannot be said to be an order without jurisdiction or contrary to section 11(6).

27. Mrs.Bagalia invited my attention to an order passed by the Chief Justice's designate in an application under section 11 in the case of *Jesmajo Industrial Fabrications Karnataka Pvt. Ltd. v. Indian Oil Corporation Ltd., 2004(1) R.A.J. 24(Bom)* As it is not a judgment Mrs.Bagalia adopted the reasoning in paragraphs 12 and 13 which read as under:

> "12. In the instant case, as we have noted earlier, the power to secure appointment is of the Chief Justice or his designate. The Chief Justice or the

designate does not decide the right of the parties but only secures an appointment. There is no power under Section 11 of the Act of 1996, as for example under Section 8(b) of the Arbitration Act, 1940. The power under Section 11 is a measure to secure appointment of the Arbitrator in the course of exercising administrative powers. That can only be to give effect to arbitral clause by nominating Arbitrator so as to enable the parties to go to the forum of their choice. To my mind, there is nothing to indicate that the Chief Justice or his designate where the clause provides for arbitral procedure for nominating Arbitrator even in case of failure to make nomination can completely give a go bye to the arbitral clause and appoint another person as Arbitrator even when the person or authority named is available. In the first instance,it would be to give effect to the agreement between the parties. An administrative authority does not displace the terms of the contract unless power is conferred by statute and it is expressly required to be dealt. Otherwise, the administrative authority can only give effect to the provisions of the contract, by directing the parties to arbitration in the manner provided. The manner provided normally should be by securing the appointment in terms of the contract between the parties. Where the terms of the agreement do not provide for securing the nomination as per explanation under Sections 11(3) and 11(6), then to secure the nomination under Section 11(6)(c), to secure nomination by

normally directing the named authority to secure the appointment within a time frame failing which to make the appointment.

. Thus on a close look at the provisions of Sections 8 and 20 of the Act of 1940, that there are specific provisions for appointment by consent of the parties or otherwise by the Court. Such power under Section 11(6) of the Act of 1996 is concerned on the Chief Justice or his designate who will act administratively. Under the Act of 1996, what the Chief Justice or a designate would do is to secure the constitution of the Tribunal by proper measure such as to direct the authority to nominate Arbitrator in those cases like Section 11(6)(c), where the contract so provides otherwise to constitute the Tribunal by nominating an Arbitrator like in case of Sections 11(6)(c) and (b). There is no other power in the administrative authority whether in the Chief Justice or his designate.

13. To sum up the following propositions emerge :

(1) The Chief Justice or his designate even if the authority or institution named does not nominate the Arbitrator which is required to be done or to constitute the arbitral tribunal, will ordinarily direct the authority or institution to nominate the Arbitrator and effectively constitute the arbitral tribunal. This is more so in the case of public bodies and corporation, where failure on

> the part of an official holding howsoever a high post, shall not result in that body being saddled with an arbitral tribunal not in terms of the contract it entered into or was entered on its behalf.
>
> (2) It is only in the event, for some good reason that the Arbitrator cannot be named or the tribunal constituted in terms of the contract, shall the Chief Justice or designate nominate the Arbitrator or constitute the arbitral tribunal beyond the terms of the contract."

28. Proposition 1 itself indicates that it is not that the Chief Justice or his designate lacks the jurisdiction to appoint arbitrators otherwise than in conformity with the agreed procedure. It only states that "ordinarily" the Chief Justice or his designate should direct the authority or institution to nominate the arbitrator in accordance with the procedure. This therefore relates to the manner of exercise of the discretion conferred by section 11(6). It does not deny the jurisdiction or the power to do otherwise.

29. Moreover, in the facts and circumstances of this case, there is good reason for the designate of the Chief Justice to have constituted the present

arbitral tribunal. As stated above, despite the three letters the Petitioner failed and neglected to activate the prescribed procedure for about a year. The Chief Justice's designate was therefore justified in not affording the Petitioner another opportunity. Even assuming that in the facts of this case I may have been inclined to afford the Petitioner another opportunity of following the agreed procedure, I am unable to state that the exercise of discretion by the Chief Justice's designate was unjustified and that he constituted an improper or an illegal arbitral tribunal. Thus, both in law and on merits this point ought to be decided against the Petitioner.

30. Similarly, Mrs.Bagalia relied upon an order passed under section 11 by the designate of the Chief Justice of the Kerala High Court in the case of *Bel House Associates (P) Ltd. v. General Manager, Southern Railway 2001(2) RAJ., 127 (Ker)*. The learned Judge followed the decision of the Madhya Pradesh High Court which held that the Chief Justice or his designate has merely to take necessary measures for enforcing the procedure laid down in the agreement and cannot make any appointment but to

enforce or compel the party to make the appointment in accordance with the agreed procedure.

31. With respect, I am unable to agree with this view. There is no machinery by which the Chief Justice or his designate exercising power under section 11(6) can enforce or compel a party to make an appointment in accordance with the agreed procedure. Mrs.Bagalia was unable to show me a single provision in the 1996 Act in this regard. Indeed, this observation is contrary to the order itself for in the ultimate analysis the learned Judge directed the Respondent to appoint an arbitrator in accordance with the agreed procedure within two months and further provided that in the event of the Respondent failing to do so it would be open to the Petitioner to seek further orders from the Court for appointment of an arbitrator. Let me carry this matter one step further. What if the Respondent had failed to comply with this direction ? The Petitioner would have made another application. Would the Chief Justice/his designate on this further application have had the jurisdiction to appoint an independent arbitrator ? If the earlier reasoning of the learned Judge were to be accepted, all that the

Petitioner would be left with would be liberty in a series of orders to make an application for the appointment of arbitrators in the event of the Respondent's failure to comply with the directions. This would render the provisions of section 11(6) nugatory. This could never have been the intention of the legislature. The result would enable a defaulting party to ensure that the proceedings are still-born.

32. The words "unless the agreement or the procedure provides other means for securing the appointment", Mrs.Bagalia submitted, support her contention. They do not. These words follow the duty cast on the Chief Justice/his designate "to take the necessary measure" where a party has failed to comply with the procedure. Clause 63 does not provide any other means for securing the appointment. It is silent on this aspect. If indeed it had provided other means for securing the appointment, it may not have been necessary, depending upon the nature of such alternate provision, for the party to even make an application under Section 11.

33. Mrs.Bagalia's contention that the difference in

the language in sub-section (6) of section 11 on the one hand and the language in sub-sections (3), (4) and (5) on the other indicate that the jurisdiction under section 11(6) is, to use her expression, "more curtailed" is also unfounded. The provisions in sub-sections (3), (4) and (5) pertain to a different situation altogether. There is nothing in these sub-sections that aid the construction of sub-clause (6).

34. In her written submissions, Mrs.Bagalia raised another argument I am not sure she did at the hearing. The argument presumes that the Chief Justice/his designate while making such an appointment under sub-section (6) decides the validity of the arbitration clause because by doing so he holds that the agreement does not secure the appointment of an independent and impartial arbitrator. The basis of the argument is itself fallacious. It proceeds on the erroneous presumption that an arbitration agreement which does not provide other means of securing the appointment is invalid. Mrs.Bagalia has not cited a single provision of law to substantiate the proposition based or which she founded the submission. The basis itself being

erroneous the main submission is unfounded.

35. Mrs.Bagalia strongly contended that such orders would not be in the interest of and would do injustice to public bodies and corporations. These are the observations in the above order as well. Public bodies and corporations no doubt have their own difficulties. These difficulties may be taken into consideration by the Chief Justice or his designate while exercising discretion under section 11(6). But, there is no rule of interpretation that requires such circumstances to be taken into consideration while interpreting statutory provisions. Section 11(6) is a statutory provision not merely for public bodies and corporations. The interpretation thereof cannot in any manner or to any extent depend upon their difficulties.

36. No fault can be found with the constitution of the arbitral tribunal. One of the arbitrators is a Chartered Accountant and the other an engineer. The Presiding Officer is a former Chief Justice of this Court. Mrs.Bagalia made a statement that the Petitioner is not pressing the ground of bias against the Presiding Officer of the Arbitral Tribunal. In

any event no case of bias was made out. It is unfortunate that the ground was at all taken. Clause 63 also requires the Chairman and Managing Director to ensure that one of the two arbitrators is from the Accounts Department. A proper and more appropriate arbitral tribunal could not have ben constituted in the present matter. He has, if I may say with respect, passed the order in conformity with the provisions of section 11(6) and 11(8) of the 1996 Act. There is nothing to suggest that the arbitral tribunal was either not appropriate or not competent to decide the differences and disputes between the parties.

37. Mrs.Bagalia then submitted that the costs contemplated by the Petitioner while entering into the agreement were far lower than the costs actually incurred in the arbitration proceedings and that therefore the arbitrator’s fees should be scaled down. This argument is unfounded and unfair to the learned arbitrators. They were appointed pursuant to the order of the Chief Justice’s designate in an application under section 11. No application to scale down their fees was ever made even before them. It would be a travesty of justice to require the

arbitrators to return their fees for no fault of theirs. The application is rejected.

38. Secondly, even assuming that the constitution of the arbitral tribunal is not in accordance with the agreement between the parties, it would not vitiate the award for that reason alone. The challenge, to succeed, must also establish that the agreement between the parties is in conflict with a provision of Part I of the 1996 Act from which the parties cannot derogate. This has been so held by the judgment of the Supreme Court in *Narayan Prasad Lohia v. Nikunj Kumar Lohia & Ors., (2002)3 Supreme Court Cases, 572.* I noticed the judgment only after the arguments were concluded. I, therefore, invited both the counsel to make their submissions in respect of this judgment before delivering my judgment. The Supreme Court held thus :

> "In our view, Section 34(2)(a)(v) cannot be read in the manner as suggested. Section 34(2)(a)(v) only applies if "the composition of the Arbitral Tribunal or the arbtiral procedure was not in accordance with the agreement of the parties". These opening words make it very clear that if the composition of the Arbitral Tribunal or the arbitral procedure is in accordance with

the agreement of the parties, as in this case, then there can be no challenge under this provision. The question of "unless such agreement was in conflict with a provision of this Part" would only arise if the composition of the Arbitral Tribunal or the arbitral procedure is not in accordance with the agreement of the parties. When the composition or the procedure is not in accordance with the agreement of the parties then the parties get a right to challenge the award. But even in such a case the right to challenge the award is restricted. The challenge can only be provided the agreement of the parties is in conflict with a provision of Part I from which the parties cannot derogate. In other words, even if the composition of the Arbitral Tribunal or the arbitral procedure is not in accordance with the agreement of the parties but if such composition or procedure is in accordance with the provisions of the said Act, then the party cannot challenge the award. The words "failing such agreement" have reference to an agreement providing for the composition of the Arbitral Tribunal or the arbitral procedure. They would come into play only if there is no agreement providing for the composition of the Arbitral Tribunal or the arbitral procedure. If there is no agreement providing for the composition of the Arbitral Tribunal or the arbitral procedure and the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with Part I of the

> said Act then also a challenge to the award would be available. Thus so long as the composition of the Arbitral Tribunal or the arbitral procedure are in accordance with the agreement of the parties, Section 34 does not permit challenge to an award merely on the ground that the composition of the Arbitral Tribunal was in conflict with the provisions of Part I of the said Act. This also indicates that Section 10 is a derogable provision."

It is not even the Petitioner's case that the agreement is not in conformity with the provisions of Part I of the 1996 Act from which the parties cannot derogate. Indeed, the contention itself would be unsustainable. Mrs.Bagalia was unable to respond to the ratio of this judgment. There is nothing in the arbitration clause which suggests that it is contrary to any of the provisions of the 1996 Act. Much less is there anything to suggest that the arbitration clause is contrary to a provision of the 1996 Act from which the parties cannot derogate. In the circumstances, even on this ground the challenge to the constitution of the arbitral tribunal under section 34(2)(v) is rejected.

39. The challenge to the order dated 24th

December, 1998 constituting the arbitral tribunal under section 11(6) and the order of the arbitral tribunal dated 8th October, 2002 regarding the challenge thereto is therefore rejected.

CHALLENGE TO THE AWARD ON MERITS

40. I will now consider the challenge in the petition to some of the claims. Mrs.Bagalia challenged the award in respect of claim Nos.1, 2(two parts), 7, 8(item 5) and 10. She also challenged the award of interest. I have upheld the challenge in respect of claim Nos.1, 2(one part), 7, 8(item 5) and 10. I will first consider the challenge to the award in respect of claim no.2(one part) and the award of interest which I have rejected.

CLAIM NO.2 (FREEZING INDICES AS ON JUNE 1994)

41. Claim No.2 pertains to escalation (Price Variation). The total amount awarded in respect of this claim is Rs.52,82,772/-. Mrs.Bagalia challenged the award in respect of two items in Claim No.2. One

item was decided in the Petitioner's favour and in respect of another Mrs.Bagalia did not press the Petition. I will here deal with the challenge pertaining to the item under reference only. I will deal with the challenge to the other item of Claim No.2 separately for in respect thereof I have upheld the challenge.

42. Mrs.Bagalia challenged the award in so far as the learned arbitrators held that the Petitioners' freezing indices as of June, 1994 for the purpose of calculating the escalation on the extended period of the contract were not correct and not in conformity with the provisions of Clause 28.10 of the Special Conditions of Contract. This challenge is not well founded.

43. The Petitioner contended that as per the extension granted by the Petitioner, no escalation was payable after 1st July, 1994. Hence indices were frozen after 1st July, 1994 in respect of calculation of escalation for the extended period. This the Petitioner contended was as per Clauses 28.10.2.1 and

28.10.2.2 of the Special Conditions of Contract.

44. If Clauses 28.10.1 and 28.10.2 are to operate the freezing of the indices was justified. But, the learned arbitrators having come to the conclusion that the respondent was not in default, the said clauses do not come into operation. This is clear from clause 28.10.2 which precedes these clauses. It reads as under :

> "28.10.2 However, where extension of time has been granted due to contractors failure under penalty clause of the General Conditions of the contract, price adjustment shall be done as follows :" (emphasis supplied)

Let me now consider how the arbitrators arrived at their conclusion.

45. By a letter dated 27th May, 1995 three extensions were granted by the Petitioner to the Respondent as under :-

> "1. The date of the completion of the above contract was 28th April 1994. Vide this office letter of even No. dated 09.05.1994, currency of the

contract was extended as under :

i). From 29.04.1994 to 30.06.1994 with price escalation and without any liquidated damages i.e. under Clause no.28.10.1 of Special Conditions of Contract forming Annexure I of the contract document.

ii). From 01.07.1994 to 31.10.1994 without any price escalation and without any liquidated damages i.e. under Clause No.28.10.2 of the Special Conditions of Contract document.

iii). From 01.11.1994 to 30.11.1994 without any price escalation and with a liquidated damages of Rs.50,000/- (Rs.Fifty thousand only) per month under Clause no.28.10.2 of Special Conditions of Contract forming Annexure I of the contract document.

2. Considering the present condition of works, Chief Engineer, Ratnagiri (South) has granted further extension beyond 30.11.1994 up to 31.05.1995 without any escalation and with liquidated damages of Rs.50,000/- per month."

46. It is important to note that the recovery of liquidated damages, as noted by the arbitrators, had been waived by the Respondent in respect of the periods mentioned in paragraphs 1(i) and 1(ii) in the above letter i.e. between 29th April, 1994 to 30th June, 1994 as well for the period from 1.7.1994 to

31.10.1994. The learned arbitrators further noted that the Petitioner had submitted a note dated 16th March, 1995 prepared by the Deputy Chief Engineer-II for obtaining the approval of the Chief Engineer for grant of extension in time for completion, paragraph 4 whereof reads as under :-

> "4. The above tunnel was successfully completed on 3.1.95. For the left over work, M/s.Patel Engineering have submitted a detailed programme vide their letter no.178/1/1278 dated 20.02.95 (SN-391).The entire tunnel was completed without any accident with accurate alignment and smooth profile. The quality of workmanship was appreciated by various officials including CMD."

47. It is important at this stage to note Clause 16.4 of the contract which reads as under:-

> "16.4 The time of completion of the works by the date or the extended date fixed for completion shall be deemed to be the essence of the contract and <u>if the contractor shall fail to complete the works within the time prescribed,</u> the Corporation shall, if satisfied that the works can be completed by the contractor within a reasonably short time thereafter, be entitled, without prejudice to any other right or remedy available in that behalf to

> recover by way of ascertained and liquidated damages a sum equivalent to one percent of the contract value of the works for each week or part of the week that the contractor is in default and allow the contractor such further extension of time as the Engineer may decide. If the Corporation is not satisfied that the works can be completed by the contractor or in the event of the failure on the part of the contractor to complete the works within the further extension of time allowed as aforesaid, the Corporation shall be entitled, without prejudice to any other right or remedy available in that behalf, to appropriate Contractor's Security Deposit and rescind the contract under clause 61.1 of these conditions whether or not actual damage is caused by such default." (emphasis supplied)

48. The learned arbitrators came to a finding of fact that the Respondent was not in default. Firstly, this is a finding of fact after considering various aspects including the aforesaid letter dated 16th March, 1995 and the fact that the Petitioner had itself waived the levy of liquidated damages. I am unable to say that the finding is at all erroneous. The learned arbitrators rightly held that liquidated damages are different from penalty and that therefore the extensions granted without the payment of escalation and/or with levy of liquidated damages

were not justified by the terms of the contract.

49. In the circumstances, Clause 28.10.2 does not come into operation against the Respondent. Clause 28.10.2 would come into operation only in the event of there being a failure on the part of the contractor i.e. the Respondent.

50. In the circumstances, the challenge to the award in regard to this claim fails.

Re: INTEREST

51. Mrs.Bagalia challenged the grant of interest by the arbitrators at 18% per annum on the ground that under clause 15.4 of the General Conditions of Contract, no interest is payable by the Petitioner to the Respondent.

52. Mr.Chinoy submitted that it is not open to the Petitioner to raise this question as it has not been raised in the Petition. The only ground of challenge in this regard he contended was that interest at 18%

per annum was exorbitant [ground (n)]. Mrs.Bagalia on the other hand relied upon ground (q) in the/check Petition to contend that the award had been challenged on the ground that it was contrary to the contractual provisions as well. It is not necessary to decide whether Mrs.Bagalia is entitled to raise this point in view of the pleadings, for I have decided to uphold the award in this regard on merits.

53. Clause 15.4 of the General Conditions of Contract reads as under :

> "**INTEREST ON AMOUNTS**
>
> 15.4 No interest will be payable upon the earnest money or the security deposit or amounts payable to the Contractor under the contract, but Government Securities deposited in terms of sub-clause 15.1 above will be repayable with interest accrued thereon as paid by the Government."

54(a). The learned arbitrators expressly referred to the clause and, in fact, construed it. In doing so, they relied upon the judgment of the Supreme Court in the case of *Board of Trustees for the Port of Calcutta v. Engineers-De-Space-Age*

(1996)1 Supreme Court Cases, 516. In that case, there was a similar clause i.e. clause 13(g) of the contract which read as under :

> "No claim for interest will be entertained by the Commissioners with respect to any money or balance which may be in their hands owing to any dispute between themselves and the Contractor or with respect to any delay on the part of the Commissioners in making interim or final payment or otherwise." (emphasis supplied)

54(b). The contention urged on behalf of the Appellant in that case was that the clause contained an absolute prohibition against the payment of interest on account of any delay on the part of the Commissioner in making interim or final payment or otherwise (emphasis supplied). In support of this contention, counsel in that case, as did Mrs.Bagalia in this case, relied upon the judgment of the Supreme Court in *Associated Engineering Company v. Government of Andhra Pradesh & Anr. AIR 1992 Supreme Court, 232* to contend that an arbitrator has to function within the terms of the contract, shall not act de-hors the contract, that he has no powers to travel beyond the contract and if he does so he would

be acting without jurisdiction. The Supreme Court noted the observations in paragraphs 26 and 29 of that judgment. Having done so, the Supreme Court held as under :

> "**4.** We are not dealing with a case in regard to award of interest for the period prior to the reference. We are dealing with a case in regard to award of interest by the arbitrator post reference. The short question, therefore, is whether in view of sub-clause (g) of clause 13 of the contract extracted earlier the arbitrator was prohibited from granting interest under the contract. Now the term in sub-clause (g) merely prohibits the Commissioner from entertaining any claim for interest and does not prohibit the arbitrator from awarding interest. The opening words "no claim for interest will be entertained by the Commissioner" clearly establishes that the intention was to prohibit the Commissioner from granting interest on account of delayed payment to the contractor. Clause has to be strictly construed for the simple reason that as pointed out by the Constitution Bench, ordinarily, a person who has a legitimate claim is entitled to payment within a reasonable time and if the payment has been delayed beyond reasonable time he can legitimately claim to be compensated for that delay whatever nomenclature one may give to his claim in that behalf.

> If that be so, we would be justified in placing a strict construction on the term of the contract on which reliance has been placed. Strictly construed the term of the contract merely prohibits the Commissioner from paying interest to the contractor for delayed payment but once the matter goes to arbitration the discretion of the arbitrator is not, in any manner, stifled by this term of the contract and the arbitrator would be entitled to consider the question of grant of interest pendente lite and award interest if he finds the claim to be justified. We are, therefore, of the opinion that under the clause of the contract the arbitrator was in no manner prohibited from awarding interest pendente lite."

54 (c). The least that must be said of the award is that it is not possible to state that the view taken by the arbitrators of clause 15.4 is ex-facie unsustainable or not a plausible view. Nor is it possible to state that the arbitrator's reliance upon the above judgment is unfounded. Indeed, clause 13(g) in *Board of Trustees For The Port of Calcutta* is similar to clause 15.4. Indeed, and it is important to note that the Supreme Court did not negative the contention that the bar contained an absolute prohibition. The bar in clause 13(g) is at least as wide as the one in clause 15.4.

54(d). The only difference is that clause 13(g) provides that no claim of interest will be entertained by the Commissioners. That, to my mind, makes no difference. It can hardly be contended that in clause 13(g) the reference to the Commissioner was to the incumbent of the Calcutta Port Trust personally. It obviously refers to the Calcutta Port Trust itself.

55. There is yet another difficulty in the Petitioner's way. Let me assume that Mrs.Bagalia's interpretation of clause 15.4 to the effect that there is, under it, a total ban on the Petitioner's liability to pay interest is correct. I have already held that the arbitrators' view is not one which is not plausible or one which can be said to be ex-facie unsustainable. Especially in view of the judgment of the Supreme Court, the view taken by the arbitrators is certainly one of the plausible views. In that view of the matter, in any event, it would not be open for me under section 34 to set aside the award. In *Board of Trustees for the Port of Calcutta (supra)* the Supreme Court further held as under :

> "**5.** Looked at from another point, if there was a dispute as to whether under this term of the contract the arbitrator was prohibited from awarding interest pendente lite, that was a matter which fell within the jurisdiction of the arbitrator, as the arbitrator would have to interpret sub-clause (g) of clause 13 of the contract and decide whether that clause prohibits him from awarding interest pendente lite. In that case it cannot be said that the arbitrator had wandered outside the contract to deny to him jurisdiction to decide the question regarding payment of interest pendente lite. Even if we were to accept the contention urged by the learned counsel for the appellant placing reliance on paragraphs 26 and 29 of the Associated Engineering Co. case we think, that the arbitrator was well within his jurisdiction in awarding interest pendente lite."

Thus, in no view of the matter can the award in this regard be set aside.

56(a). A similar question fell for consideration in *U.P.Hotels v. U.P.State Electricity Board (1989) 1 SCC, 359.* In that case, while awarding a certain claim the Umpire construed a judgement of the Supreme Court in *Indian Aluminium Co. Ltd. v. Kerala State Electricity Board, (1975) 2 SCC, 414*. For the

purpose of construing section 49 of the Electricity (Supply) Act, 1948, the Umpire at length construed the provisions of section 49 in the light of the judgment of the Supreme Court in the *Indian Aluminium Companies* case. The Supreme Court rejected the challenge to the award in the following manner :

> "17. It appears that the main question that arises is: whether the decision of this Court in *Indian Aluminium* case was properly understood and appreciated by the learned Umpire and whether he properly applied the agreement between the parties in the light of the aforesaid decision. It was contended that the question was whether the sums payable under clause 9 included discounts. On the aforesaid basis it was contended that there was an error of law and such error was manifest on the face of the award. Even assuming, however, that there was an error of construction of the agreement or even that there was an error of law in arriving at a conclusion, such an error is not an error which is amenable to correction even in a reasoned award under the law. Reference may be made to the observations of this Court in *Coimbatore District P.T. Samgam v. Bala Subramania Foundry*, where it *was* reiterated that an awarrd can only be set aside if there is an error on its face."
>
> "27. In the instant case, the view taken by the Umpire on the

interpretation of the agreement between the parties in the light of the observations of this Court in *Indian Aluminium Co.* case was at best a possible view to take, if not the correct view. If that was the position then such a view, even if wrong, cannot be corrected by this Court on the basis of long line of decisions of this Court. In the aforesaid view of the matter it is necessary to examine the aforesaid decision in the *Indian Aluminium Co.* case.

.....

.....

The Umpire was right. In our opinion, the Umpire committed no error in arriving at such conclusion. Furthermore, such a conclusion is certainly a possible view of the interpretation of the decision of this Court in *Indian Aluminium Co.* case, if not the only view. We need go no further than that."

"28. We are, therefore, of the opinion that the view taken by the Umpire on Section 49 was a possible view in the light of the decision of this Court in *Indian Aluminium* case. In the premises, a question of law arose certainly during the course of the proceedings. Such a question has been decided by the Umpire on a view which is a possible one to take. Even if there was no specific reference of a question of law referred to the Umpire, there was a question of law involved. Even on the assumption that such a view is not right, the award is not amenable to interference or correction by the courts of law as there is no proposition of law which could be said to be the basis of the award

> of the Umpire, and which is erroneous."

56(b). The reasoning of the Supreme Court in the above case squarely applies to the present case. The learned arbitrators construed the judgment of the Supreme Court in *Board of Trustees For The Port of Calcutta* while arriving at their conclusion. I have already held that it cannot be stated that the construction placed by the learned arbitrators is irrational, absurd or not plausible.

57. Faced with this situation, Mrs.Bagalia contended that the entire body of law consisting inter-alia of the judgments of the Supreme Court and the various High Courts which lay down the principle embodied in paragraph 5 of the judgment of the Supreme Court in *Board of Trustees for the Port of Calcutta* set out above are no longer good law in view of the Arbitration and Conciliation Act, 1996 and in view of the judgment of the Supreme Court in *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003)5 Supreme Court Cases, 705*.

58. I am unable to accept this contention. I have recently rejected a similar contention in Arbitration

Petition No.152 of 2004. In paragraphs 15 to 19, I have held as under :

> "15. Mr.Kotwal however submitted that the judgment of Supreme Court in *Smita Conductors Ltd.* as well as all the judgments of the Supreme Court and the High Courts on this point should be deemed to be no longer good law in view of the Arbitration and Conciliation Act, 1996 and in view of the judgment of the Supreme Court in *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003)5 Supreme Court Cases, 705*. According to him, the judgment mandates that when an award is challenged on the ground that the arbitrator's interpretation of a term in the contract is incorrect, the Court must construe the clause itself and then set aside the award if its interpretation of the term is different from that of the arbitrators even if the Court comes to the conclusion that the arbitrator's interpretation is plausible and arrived at after due consideration thereof.
>
> 16. The submission is unfounded. The judgment in *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* does not either expressly or even impliedly support Mr.Kotwal's submission.
>
> 17. In *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan & Ors. (1999)5 Supreme*

Court Cases 651 the Supreme Court held in paragraph 17 as under :

> "**17.** Section 34 of the Act is based on Article 34 of the **UNCITRAL** Model Law and it will be noticed that under the 1996 Act the scope of the provisions for setting aside the award is far (sic more or) less the same as under Section 30 or Section 33 of the Arbitration Act of 1940."

18. Mr.Kotwal's submission is contrary to the judgment of the Supreme Court in the above case. To accept Mr.Kotwal's submission would be to radically alter the statutorily and judicially circumscribed limits to the Court's jurisdiction to interfere with arbitration awards. It would indeed confer a first appellate court's power on a court exercising jurisdiction under Section 34 of the 1996 Act. There is nothing in the 1996 Act which indicates such an intention on the part of the legislature. That the intention is to the contrary is clear inter-alia from the Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act which stated as one of its main objectives the need " to minimise the supervisory role of Courts in the Arbitral process".

19. In the circumstances, the aforesaid principles laid down consistently by the Supreme Court and the various High Courts cannot be said to be no

> longer good law in view of the 1996 Act. Nor can it be said that the observations of the Supreme Court in *Oil & Natural Gas Corporation v. Saw Pipes Ltd.* (supra) have expressly or impliedly rendered the aforesaid judgments and the principles contained therein no longer good law in view of the 1996 Act. The principles apply with equal force under the 1996 Act. In view thereof, the Petitioner's challenge to the award in this regard must fail."

I found no reason to persuade me to take a different view on this aspect of the matter.

59. It is important to note that Mrs.Bagalia did not contend that the judgment in *Board of Trustees for the Port of Calcutta* does not support the view of the learned arbitrators. In fact, on this aspect there was no response from Mrs.Bagalia.

60(a). Mrs.Bagalia however relied upon the judgment of the Supreme Court in *Oil and Natural Gas Corporation Ltd. versus Saw Pipes Ltd., (2003) 5 Supreme Court Cases 705* in respect of her contention that the award of interest was unsustainable. The question under consideration in *O.N.G.C. v. Saw Pipes* was however not the same as one that was

decided by the Supreme Court in *Board of Trustees for the Port of Calcutta*. In that case the clause provided that no interest will be paid on disputed claims. In that case, the Arbitral Tribunal had arrived at a conclusion that the Appellant had wrongly withheld/deducted certain amounts payable by it to the Respondent on account of the delay in supply of goods and on account of excise duty, sales tax and freight charges as and by way of liquidated damages and thereafter arrived at a conclusion that the said amount was deducted from the undisputed invoice amount and that therefore, the claim of the Respondents cannot be held to be a disputed claim. The Supreme Court held as under :-

> "72. It is apparent that the claim of the contractor to recover the said amount was disputed mainly because it was an agreed term between the parties that in case of delay in supply of goods the appellant was entitled to recover damages at the rate as specified in the agreement. It was also agreed that the said liquidated damages were to be recovered by paying authorities from the bills for payment of the cost of material submitted by the contractor. If this agreed amount is deducted and thereafter the contractor claims it back on the ground that the appellant was not entitled to

deduct the same as it has failed to prove loss suffered by it, the said claim undoubtedly would be a "disputed claim". The arbitrators were required to decide by considering the facts and the law applicable, whether the deduction was justified or not. That itself would indicate that the claim of the contractor was "disputed claim" and not "undisputed". The reason recorded by the arbitrators that as the goods were received and bills are not disputed, therefore, the claim for recovering the amount of bills cannot be held to be "disputed claim", is, on the fact of it, unjust, unreasonable, unsustainable and patently illegal as well as against the expressed terms of the contract. As quoted above, clause 34.4 in terms provides that no interest would be payable on "disputed claim". It also provides that in which set of circumstances, interest amount would be paid in case of delay in payment of undisputed claim. In such case, the interest rate is also specified at 1% per month on such undisputed claim amount. Despite this clause, the Arbitral Tribunal came to the conclusion that it was undisputed claim and held that in law, the appellant was not entitled to withhold these two payments from the invoice raised by the respondent and hence directed that the appellant was liable to pay interest on wrongful deductions at the rate of 12% p.a. from 1-4-1997 till the date of filing of the statement of claim and thereafter having regard to the commercial nature of the transaction at the rate of 18%

p.a. pendente lite till payment."

60(b). The Supreme Court construed the clause and held that the amount which was withheld by the Appellant constituted a disputed claim. I am not prepared to accept Mrs.Bagalia's contention that the judgment in *Board of Trustees for the Port of Calcutta* must be deemed to have been overruled by the judgment in *O.N.G.C. versus Saw Pipes*. The Supreme Court did not in that case consider the questions that was decided in *Board of Directors for the Port of Calcutta*. The judgment was not even referred to in *O.N.G.C. versus Saw Pipes.* The reliance therefore upon the judgment of the Supreme Court in *Oil and Natural Gas Corporation Ltd. versus Saw Pipes Ltd.* is not well founded.

61. The judgment of the Supreme Court in *State of U.P. v. Harish Chandra (1999) 1 S.C.C. 63* relied upon by Mr.Chinoy is of no assistance to him. The judgment construed the clause which in that case was different from clause 15.4 in the present case. The judgment therefore is of no assistance in construing clause 15.4.

62. The rate of interest at 18% per annum was not seriously challenged and indeed it cannot be. The agreement is silent in this regard. The arbitrators had the jurisdiction to grant interest at that rate under section 37 of the 1996 Act.

63. In the circumstances, the challenge to the award in so far as the arbitral tribunal has awarded interest is rejected.

CLAIMS IN RESPECT OF WHICH THE AWARD IS SET ASIDE

64. Before I deal with the award in respect of the remaining claims, it would be convenient to refer to the authorities cited by Mr.Chinoy and Mrs.Bagalia pertaining to the scope and ambit of interference by a Court in respect of an award, under Section 34 of 1996 Act.

65. Mr.Chinoy relied upon various judgments of the Supreme Court essentially in respect of the submission that since the interpretation of the contract is a matter for the arbitrator to determine,

the Court cannot substitute its decision regarding the interpretation of the Contract. The Court cannot substitute the decision of the arbitrator regarding interpretation of the contractual provision once it is found that this dispute was conceded to the arbitrator. Thus, he submitted, even if in fact the arbitrators had interpreted the relevant clauses of the contract and the Court was of the view that the interpretation is erroneous, the Court cannot touch the award if it is within the jurisdiction of the arbitrators to interpret the contract. He relied upon the following judgments and the observations therein :

(a). In *Sudarshan Trading Co. versus Government of Kerala, (1989) 2 SCC 38,* it was held as under :-

> "What is the interpretation of the contract is a matter for the arbitrator and on which the Court cannot substitute its own decision"

(b). In *Hindustan Construction Company Ltd. versus State of J. & K., (1992) 4 SCC 217,* it was held as under :-

> "Even if in fact the arbitrators had interpreted the relevant clauses of the contract in making their award on the impugned items and even if the interpretation is erroneous, the court cannot touch the award as it is within the jurisdiction of the arbitrators to interpret the contract".

(c). Mr.Chinoy also relied upon the judgment in *H.P. State Electricity Board v. R.J. Shah & Co. : (1999) 4 S.C.C. 214*. I will deal with this judgment in some detail while dealing with the award in respect of Claim No.2 (Value of "R").

66. I have proceeded on the basis that the judgments have not been rendered no longer good law either in view of the 1996 Act or in view of the judgments in *O.N.G.C. versus Saw Pipes Ltd* (supra).

67. Considering the grounds on which I have set aside the award in respect of certain claims, it would be convenient at this stage itself to refer to the judgments of the Supreme Court in two cases relied upon by Mrs.Bagalia.

(a). In *Associates Engineering versus State of Andhra Pradesh, AIR 1992 SC 232*, the Supreme Court

found that the arbitrators had admittedly awarded a claim contrary to the formulae expressly stipulated in the contract. It is true, as Mr.Chinoy pointed out, that there was no question of the Supreme Court interpreting the contract in that case for the parties agreed there that the award was on a basis other than the one provided by the contractor. It is pertinent to note however, for the purpose of this judgment, that the award in that case did not seek to construe or interpret the contractual provision. The Supreme Court noting the fact that the formulae provided by the contract was different from the formulae applied by the arbitrators held : "this question is reached not by construction of the contract but by merely looking at the contract". The Supreme Court further held in paragraph 26 as under:-

> "26. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be

> interfered with unless he has given reasons for the award disclosing an error apparent on the face of it."

(b). In *Rajasthan State Mines & Minerals Ltd. versus Eastern Engineering, AIR 1999 SC 3627,* the Supreme Court held as under :-

> 26. In a concurring judgment, Hidayatullah, J. after considering the decision in Champsey Bhara and Company's case (supra) observed that "the first point is therefore to decide what were the limits of the arbitrator's action as disclosed by the reference and the deed of partnership and then to see what the arbitrator has actually done and not what he may have stated loosely in his award. This is the only way in which the excess of jurisdiction can be found. If the interpretation of the deed of partnership lies with the arbitrator, then there is no question of sitting in appeal over his interpretation, in view of the passage quoted above from Champsey's case but if the parties set limits to action by the arbitrator, then the arbitrator had to follow the limits set for him, and the court can find that he has exceeded his jurisdiction on proof of such action."

Summarising its decision, the Supreme Court in

paragraph 44 (f), (h) and (i) held as under :-

> "44 (f) : To find out whether the arbitrator has travelled beyond his jurisdiction,it would be necessary to consider the agreement between the parties containing the arbitration clause.Arbitrator acting beyond his jurisdiction - is a different ground from the error apparent on the fact of the award.
>
> (h) The award made by the Arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a jurisdictional error which requires ultimately to be decided by the Court. He cannot award an amount which is ruled out or prohibited by the terms of the agreement. Because of specific bar stipulated by the parties in the agreement, that claim could not be raised. Even if it is raised and referred to arbitration because of wider arbitration clause such claim amount cannot be awarded as agreement is binding between the parties and the arbitrator has to adjudicate as per the agreement. This aspect is absolutely made clear in Continental Construction Co.Ltd. (AIR 1988 SC 1166) (supra) by relying upon the following passage from M/s. Alopi Prashad v. Union of India (1960) 2 SCR 793 : (AIR 1960 SC 588) which is to be following effect :-
>
> . "<u>There it was observed that a contract is not frustrated merely because the circumstances</u>

in which the contract was made altered. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of event which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous."

(i) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala fide action."

CLAIM NO.1

68. The Respondent claimed various amounts in respect of its Running Bill Nos.66, 67 and 68. The Petitioner contended that Bill Nos.66 and 67 were passed but payments in respect thereof had not been

released as the amounts thereunder were to be adjusted towards recoveries due from R.A. Bill No.68 which was the final bill.

69. The recoveries were on various counts. The one that I am concerned with in this case is the recovery made towards steel not recovered. The Petitioner adjusted an amount of Rs.13,60,005/- towards shortage on account of steel issued to the Respondent. The Respondent did not deny that amounts were to be recovered on this account by the Petitioner but contended that the same should be at the normal issue rate as against the rate at which the Respondent sought to recover the same viz. at the then prevailing market rates. The learned arbitrators have permitted the Petitioner to recover the amounts for this item, only in the sum of Rs.8,07,469/-.

70. Clause 42.5.1 of the Special Conditions of Contract reads as under :

> "42.5.1 **Recovery for scrap / unaccounted steel** :
>
> Recovery for the scrap and unaccounted steel shall be regulated on the following

basis :-

Type	M.S.Road	Structural Sections & Plates	Rate of recovery
i) Irrecoverable wastage for which no charges will be levied	NIL	Up to maxi.of 2% of the weight based on approved DOD/drawings	NIL
ii)Recoverable wastage	up to 6% of the total weight of rods of the particular section used in work	A further 6% of the weight based on approved DOD/ drawings	At 75% of the prevai--ling market rate*
	Beyond 6% as Above	Beyond 8% as above	At twice the prevai--ling Market rates* (emphasis supplied)

*for the relevant section at final accounting stage."

71. The finding of the arbitrators is as follows :

> "..... It is to be stated that provision of recovery at double the market rates was intended to be a deterrent against pilferage or theft of steel sections when it was a controlled commodity and the market price of steel was much higher, when compared with

> the departmental issue rate. This was no longer true and steel was easily available in the market. In any case the Claimant is agreeable to the recovery at market rate plus 20% departmental charges amounting to Rs.8,07,469/-. We are of the opinion that this is a just and equitable figure and as such we hold that recovery for unaccounted steel be made for an amount of Rs.8,07,469/- only."

72. The award is ex-facie unsustainable. The arbitrators were not called upon to decide whether the intention behind the clause was outdated. They were not called upon to decide whether the purpose behind the clause was no longer in existence. In fact they were not called upon to decide the purpose of the clause at all. They had no mandate from the parties to decide such questions. They therefore had no authority or jurisdiction to decide these questions.

73. In order to see what the jurisdiction of the arbitrator is, it is open to the Court to see what dispute was submitted to him (Associated Engineering Company v. Government of Andhra Pradesh, AIR 1992 Supreme Court, 232, paragraphs 28 and 29). For this purpose the Court may look into documents including the contract and the reference made to the

arbitrators. (See *H.P.State Electricity Board v. R.J.Shah & Company (1999) 4 Supreme Court Cases, 214*). I therefore went through the statement of claim in this regard. What is surprising is that the parties did not even put this aspect in issue. There is not a whisper therein inviting the arbitrators to decide these questions.

74. It is important to note that the arbitrators have not even attempted to state that the clause as read, does not support the recovery sought to be made by the Petitioner. It was not for the arbitrators to go into the question of the purpose of the contractual provision specially when neither party invited them to do so. They had quite simply to decide the matter in accordance with the contractual provision which they failed to do. The arbitrators having noted the clause deliberately disregarded and ignored it and made the award contrary to the express terms of the contract. That they have done so is clear from the last sentence quoted above, where the arbitrators state that their award is on the basis of the Respondent’s suggestion, which they perceived to be "just and equitable". This, they were clearly not entitled to do. The award in this regard is clearly contrary to several

judgments of the Supreme Court (See for instance in Alopi Prasad v. Union of India, A.I.R. 1960 Supreme Court, 588).

75. Mr.Chinoy did not meet this case during the hearing. But obviously, as stated in the written submissions filed on behalf of the Respondent, this was through inadvertance. The written submissions however only make matters worse for the Respondent and in fact support the conclusion I have come to. The written submissions do not even attempt to support the reasoning of the arbitrators.

76. It is not contended in the written submissions that the arbitrators construed the clause. It is not even contended that the calculation was based on an implied construction of the clause. It is not contended that the arbitrators were entitled to overlook or disregard the clause for any reason. Nor is it contended that the clause for some reason did not continue to operate. It is stated that the Respondent contended in the statement of claim that the steel was not "unaccounted" having been used in ancilliary works. But, this was neither the finding nor the reasoning furnished by the arbitrators. The

finding was in fact to the contrary, as the arbitrators did not permit a part of the deduction. The arbitrators therefore did not base their award on what the Respondent contends in the written submission.

77. In awarding this claim the arbitrators travelled outside the boundary of the contract and clearly exceeded their jurisdiction. They also adjudicated upon aspects that were not referred to them.

78. The award, in so far as it permits recovery of only Rs.8,07,469 and not Rs.13,60,005 is set aside. The Petitioner shall be entitled to recover a sum of Rs.13,60,005/- in respect of scrap unaccounted steel.

Re: CLAIM NO.2 (VALUE OF 'R')

79. The other item in claim no.2 in respect of which the award was challenged was in respect of the arbitrators having reduced the value of the variable 'R' in the formula specified in the contract for

calculating escalation.

80. Clauses 28.4 and 28.6 read as under :-

"28.4 The percentage component of various items in the contract on which variation in prices shall be admissible shall be as given in the table below. In the event of Corporation arranging for supplies of explosives/detonators at fixed prices as stated in clause 43 hereof, the relevant percentage components mentioned hereunder will not be considered for any price variation.

Description of Component	Percentage component for tunnel works
Labour	45%
Fuel	15%
Explosives	15%
Detonators	5%
Other materials	5%
Fixed component (which will not be considered for any price variation)	15%

28.6 The amount of variation

in prices in the several components (labour, material etc.) shall be worked out by the following formulae :

$$i)\quad L = \frac{R \times (I - Io)}{Io} \times \frac{P}{100}$$

$$ii)\quad M = \frac{R \times (W - Wo)}{Wo} \times \frac{Q}{100}$$

$$iii)\quad U = \frac{R \times (F - Fo)}{Fo} \times \frac{Z}{100}$$

$$iv)\quad X = \frac{R \times (E - Eo)}{Eo} \times \frac{S}{100}$$

$$v)\quad N = \frac{R \times (D - Do)}{Do} \times \frac{T}{100}$$

L = Amount of price variation in Labour

M = amount of price variation in materials

U = Amount of price variation in fuel

X = Amount of price variation in explosives

N = Amount of price variation in

> Detonators
>
> R = Gross value of the work done by the contractor as per on account bill (s) excluding cost of materials supplied by Corporation at fixed price. This will also exclude specific payment, if any, to be made to the consultants engaged by the Contractors (such payment will be indicated in the contractors offer). (emphasis supplied)

. Of the variables in the above formula, we are concerned only with ‘R’. It is unnecessary therefore to set out the particulars of the other variables.

81. The main difference between the parties in respect of ‘R’ as stated out by the arbitrators was:-

> "a. Computation of value of "R" whether the same is equal to the gross value of work or any deductions to be made from the gross bill."

82. Mrs.Bagalia submitted that the arbitrators computed the variable "R" contrary to the express provision in Clause 28.6. The submission is well founded.

83. The Petitioner calculated the value of "R" expressly in accordance with Clause 28.6, by excluding the cost of material supplied by the Petitioner at fixed prices. The arbitrators however held :

> "For calculation of price variation for labour, fuel and other material, gross value of the work done as per on account bills be taken in computation as "R"." (emphasis supplied)

A mere reading of clause 28.6 shows that this is not permissible. Let me summarise what I will presently demonstrate :-

i) The arbitrators in fact expressly construed the clause correctly by holding that "R" is defined as gross value of work done excluding the cost of materials supplied by the Corporation at fixed price. (Paragraph 2.5 of the award).

ii) This construction is not only correct but is the only possible construction. This construction is arrived at not by

interpreting the clause but by merely looking at the clause (As did the Supreme Court in *Associated Engineering* (supra) paragraph 23).

iii) The basis of the award extracted in sub-para (a) above is not only contrary to the express language of clause 28.6 but is in fact contrary to the arbitrators construction of clause 28.6.

iv) Even assuming by some process of reasoning that the arbitrators did not construe clause 28.6 as held by me above, the award cannot be upheld for the basis of the award quoted in sub-para (a) above is neither supported by nor a consequence of any interpretation of clause 28.6 on the part of the arbitrators.

Other than what I have referred to in clause (i) above the award is totally silent on the aspect of the interpretation of clause 28.6. In that case it must necessarily be held that the arbitrators did not even attempt to construe or interpret the clause.

v) That the arbitrators noted the clause and the submission of the parties regarding the interpretation thereof does not ipso-facto justify the conclusion that the arbitrators, sub-silentio, interpreted the clause.

vi) The arbitrators considered the deductions provided by the contract as illogical. Indeed the logic of the provisions/deductions were not even in issue before the learned arbitrators. I will shortly demonstrate that the finding of the learned Arbitrators : "These deductions are not very logical ....." referred not to the deductions made by the Petitioners being illogical as being contrary to clause 28.6 but to the contractual provision itself being illogical.

84. Clause 28.6 is so clear that it does not admit of two views. I asked Mr.Chinoy by what process of reasonings would another interpretation be possible. In other words, I asked him on what basis could it be contended that while considering the value of "R", the cost of the material supplied by

the Petitioner at a fixed price should not be excluded. He was able to furnish none.

85. Mr.Chinoy submitted however that the award was not open to challenge under Section 34 as, according to him there was a dispute regarding the import and effect of the value of "R" ; that the arbitrators' interpretation thereof was expressly sought ; that the arbitrators' interpreted the clause after treating it as a point of interpretation and only thereafter accepted the Respondent's interpretation.

86. I will assume that there was a dispute regarding the import or effect of the clause. I will also assume that the parties were not ad-idem about the interpretation of the clause. I will further assume that the arbitrators were called upon to interpret the clause. I cannot however, assume that the arbitrators interpreted the clause as suggested by Mr.Chinoy. They quite plainly did not. This is clear from paragraph 2.5 of the award. As I have decided to set aside the award in this regard, it is only fair that I set out the entire paragraph. It reads as under :-

"2.5 In the instant case, explosives and detonators are supplied by the Respondent at fixed prices in accordance with the provisions of the contract and as such no price variation is payable for these items. Formulae given under Clause 28.6 are to be adopted only in case of labour, fuel and other materials. Percentage of these components is given under Clause 28.4. It is to be noted that these percentages are for the gross value of the work executed. The confusion arises only because under Clause 28.6, "R" is defined as gross value of the work done by the contractor as per on account bill (s) excluding the cost of materials supplied by Corporation at fixed prices. Respondent has supplied at fixed prices explosives and detonators. If the value of these items is reduced from the amount of the gross value of the work done, percentage of labour, fuel and other material get automatically reduced and the total of all the components would no longer be 100 ; i.e. reduction in value of R would automatically mean reduction in the percentage of the components specified under Clause 28.6. During oral submissions, the Claimant stated that in the initial stages, the Respondent has computed and paid the escalation amounts on the basis of the gross value of bill taken as R but at a later date they started making deductions for the supply of explosives and detonators. These deductions are not very logical as assuming that the Contractor has procured these items from the market at a fixed

> price, the value of R for computation of labour, fuel and other materials shall have to be considered all inclusive, although the Claimant would not get any escalation for explosives and detonators. In view of this we are of the opinion that for calculation of price variation for labour, fuel and other materials gross value of work done as per on account bills be taken in computation as "R"." (emphasis supplied)

87. The entire reasoning is aimed only at indicating why the contractual provision is not logical. The arbitrators in the first sentence emphasised above state that "confusion arises" because of the definition of "R". They do not state why the confusion arises.

88. It is crucial to note that in that sentence the arbitrators expressly note that "R is defined as gross value of work done.....excluding the cost of material supplied". They thus noted the fact that clause 28.6 required the cost of material supplied to be excluded from the value of ‘R’. This was the arbitrators’ interpretation. At no stage in the award have they interpreted the clause otherwise. If it is held that this was not the interpretation of the arbitrators then I am afraid that the arbitrators

have not interpreted the clause at all. Other than this sentence there is nothing else in the award that can be considered an exercise of interpretation.

89. In the second sentence emphasised above, the arbitrators attempted to demonstrate why according to them the contractual provision is absurd. The opening words in that sentence, "If the value of these items is reduced from the amount of gross value of the work done .....", establishes this clearly. The arbitrators do not in this sentence say that the value of those items is not to be reduced as per clause 28.6. They merely state the consequence of reduction as per the clause. The sentence therefore does not indicate even an attempt at interpreting the clause. The second sentence emphasised in the paragraph therefore merely indicates the arbitrators' reasons for the deductions contractually provided being illogical. There is not one sentence in the entire award which states either expressly or even impliedly that the construction of the clause does not warrant the deductions.

90. The third sentence emphasised above therefore clearly is the arbitrators opinion that the

value of ‘R’ as provided in the contract is not logical and not that the Petitioner’s deductions were not logical as being contrary to the clause.

91. Mr.Chinoy did not dispute the fact that the arbitrators had held that the clause was not logical. Mr.Chinoy was also unable to show me any part of the award which indicates that the clause had been so interpreted as to lead to the conclusion in the award I have quoted in paragraph 83 herein.

92. Mr.Chinoy, however, submitted that I must assume that the clause had been construed in view of certain facts. He stated that the arbitrators had extracted in paragraph 2 a part of the statement of claim where the Respondent had stated that reduced payment was based on the Petitioner’s improper interpretation of the contract provisions. The arbitrators in paragraph 2.1 referred to the Petitioner’s reply thereto by relying upon the aforesaid provisions to contend that while taking the value of "R" all costs of material supplied by the Petitioner at fixed prices are to be deducted. In paragraph 2.3, the arbitrators have recorded that as there were discrepancies in the statements submitted

by the Petitioner, the arbitrators directed both the parties to jointly prepare the statements for calculating the escalation payable and the amount actually paid as escalation. Pursuant to the directions, the parties submitted their calculations. A joint note was signed by both parties stating their rival claims. The note further stated that "the main difference is on the following issues" :-

. "(a). Computation of value of "R" whether the same is equal to gross value of work or any deductions to be made from the gross bill".

93. In paragraph 2.4 the arbitrators stated that the "computations made by the Respondent and the claimant have to be decided on the correct interpretation of the contractual provision". They thereafter set out the relevant clauses which I have set out above. All that paragraph 2.4 indicates is that the arbitrators stated that the computations made by the parties have to be on the correct interpretation of the contractual provisions. They however did not followed up the same by interpreting the contractual provisions as suggested by Mr.Chinoy.

94. Mr.Chinoy submitted that it cannot be contended that the arbitrators were oblivious of clause 28.6. I agree. He submitted that the arbitrators had in fact referred to the contractual provisions in the award. That is clear. Therefore, he submitted, I must presume that the arbitrators in fact construed the clause. At the cost of repetition it is imperative to reiterate that the only reference to interpretation of clause 28.6 is in the first emphasised sentence of paragraph 2.5 of the award set of earlier in this judgment, where the arbitrators interpretated the clause correctly and in conformity with the Petitioner's submission. However, despite the same they proceeded to make the award contrary thereto on the basis that the deductions provided therein were not quite logical.

95. Merely because the arbitrators referred to the contractual provisions and to the contentions of either side, it would not justify the conclusion that the arbitrators construed the contractual provisions. Nor would it justify the conclusion that the arbitrators did not disregard the contractual provisions. The contention that once it is found that the arbitrators have noticed the relevant

provision in the contract and stated that the interpretation thereof is required it follows ipso-facto in all cases that the arbitrators have in fact interpreted the clause is unsustainable. The contention has less force when the arbitrators are required to give a reasoned award as in the present case. In the facts of this case the contention has no force for the reasons I have already given. In the present case the arbitrators despite having noted the relevant clauses did not even attempt to construe them. They have nowhere stated that they construed the clause. And this, after having correctly construed the clause to expressly exclude the said costs. They referred to but disregarded the clause and made an award contrary to the express provisions thereof.

96. Mr.Chinoy referred to paragraph 2.3 of the award for two reasons. Firstly he submitted that the note signed by both parties constituted a specific reference as to the interpretation of the clause in the course of a general reference by the parties. This would be less than fair to the Petitioner. It was for the convenience and as per the directions of the arbitrators that the note was prepared. This is

clear from the second sentence in paragraph 2.3. The parties did not do so voluntarily. In fact the third sentence in paragraph 2.3 makes it clear that it was pursuant to these directions that the parties submitted the note. In the circumstances, I reject the contention that the note constitutes a specific reference as to the interpretation of the clause.

97 (a). Mr.Chinoy relied upon the judgments of the Supreme Court I have referred to earlier in support his submissions which I have also set out earlier. He placed particular reliance upon the judgment in *H.P.State Electricity Board v. R.J.Shah & Co. : (1999) 4 Supreme Court Cases, 214.*

(b). In that case, the Appellant's contention was that the contract was an item rate contract. It was only in respect of those items which crossed the deviation limit of 20% that revised market rates were to be paid. It was further submitted that on a correct interpretation of clause 12-A, the arbitrators had no jurisdiction to revise the rates of any item merely because the overall value of the contract had been exceeded by 20% and that the contract permitted increased rates for individual

items only if there was a deviation in respect of the individual items by more than 20%. Mr.Chinoy relied upon paragraph 21 of the judgment, where the Supreme Court held, following the earlier decisions of the Supreme Court in *Sudarshan Trading Company versus Government of Kerala, 1989 (2) S.C.C. 38,* that once there is jurisdiction as to the contract, what is the interpretation of that contract, is a matter for the arbitrator and on which the Court cannot substitute its own decision. Mr.Chinoy then relied upon paragraphs 25, 26 and 27 of the judgment which read as under :-

> "25. From the aforesaid decisions of this Court, and the last one in particular, it is clear that when the arbitrator is required to construe a contract then merely because another view may be possible the court would not be justified in construing the contract in a different manner and then to set aside the award by observing that the arbitrator has exceeded the jurisdiction in making the award.
>
> 26. In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimant could raise a particular dispute or claim before an arbitrator. If the answer is in the affirmative then it is clear that the arbitrator would have the jurisdiction to deal with

such a claim.....

27. In this case the arbitration clause is widely worded. The dispute which was referred to the arbitrators, inter alia, related to the construction of the contract. The contract did visualise the contractor raising a claim for revision of rates. The dispute was as to when such a claim could be raised. According to the appellant herein this being an item rate contract the revision of rates could take place only in accordance with clause 12-A when there was a deviation of more than 20 per cent with regard to individual items. On the other hand the terms of the contract, according to the claimant, permitted a claim being made of revision in rates if there was an increase of 20 per cent of the total value of the contract. The disputed before the arbitrators, therefore, clearly related to the interpretation of the terms of the contract. The said contract was being read by the parties differently. The arbitrators were, therefore, clearly called upon to construe or interpret the terms of the contract. The decision thereon, even if it be erroneous, cannot be said to be without jurisdiction. It cannot be said that the award showed that there was an error of jurisdiction even though there may have been an error in the exercise of jurisdiction by the arbitrators".

(c). The judgment is of no assistance to Mr.Chinoy for it proceeded on the basis that the arbitrators

had interpreted the clause. The Supreme Court did not find that the arbitrators had failed to construe the clause. Nor did the Supreme Court find that the arbitrators had made an award contrary not merely to the contractual provision but also contrary to the arbitrators own construction thereof and which construction was correct. It must also be remembered that it was a decision under the 1940 Act and a case in which the Supreme Court was dealing with a non-speaking award. In the present case, the arbitrators were bound to give reasons. The only reason in the award which I can decipher is that the contractual provision is illogical. The judgments are therefore of no assistance to Mr.Chinoy in view of what I have held.

98. The mere fact that the Petitioner may have made the payments at one stage without making the aforesaid deductions can be of no assistance. If a clause is susceptible to two interpretations, this may be one factor to be taken into consideration while interpreting the clause. Mr.Chinoy’s entire argument was therefore based on an erroneous presumption that the arbitrators had interpreted the clause. Founding himself on this erroneous basis he

submitted that the interpretation of the arbitrators cannot be challenged on the ground that another view is possible.

99. Had the clause been clear and to be interpreted in the manner contended by the Respondent, it may have been one thing. But to my mind, the clause is clearly contrary to what the Respondent now contends it ought to be.

100. The award in this regard is therefore set aside. The amount shall be calculated in accordance with clause 28.6 i.e. excluding in the value of ‘R’ the cost of materials supplied by the Petitioner at fixed prices.

Re: CLAIM NO.7

101. The Respondent made this claim before the arbitrators in respect of "Tunnel Hazards". The Respondent in the course of the proceedings abandoned this basis and required the determination of the claim on the entirely different basis of "Tunnel

over-breaks". This without even an amendment of the reference.

102. As I intend setting aside the award in so far as the arbitrators have granted a part of this claim, I will set out the statement of claim in this respect in its entirety.

> "S.C.-15 Claim No.7 : Tunnel Hazards
>
> Despite adequate precautions taken by the contractor during the tunnel excavation, excessive overbreaks had occured in the tunnel due to concealed joints fractures and other natural weaknesses in the rock strata. In such a case the rock breaks along the plane of the concealed joints, which is weaker than the plane of opening desired to be created during excavation. Therefore the actual overbreak was much larger than 10% payable to the contractor and this created special hazards in the tunnel.
>
> Under clause 50.2.5 of the Special Conditions of Contract, the excavation and removal of debris connected with the tunnel hazards and not due to the contractor’s fault is payable separately at a rate to be mutually negotiated.
>
> The claimant has claimed a rate of Rs.150 per cubic meter for the additional overbreak, as stated

> in letter 100/178/1/4199 dated 24.07.1996. (Annexure 31). But the Respondent failed in settling the claim. The amount payable for the additional overbreak quantity of 15816.949 cubic meter @ Rs.150 per cubic meter is Rs.23,72,542/-. The claimant also claims interest thereon @ 25 per cent per annum from 24-07-1996 upto the date of payment. The claimant humbly requests the Hon'ble Arbitrators to kindly award the same in its favour."

103. It is important to note at this stage itself that in the rejoinder to the Petitioner's reply to this claim the Respondent has done nothing more than repeating and reiterating what is stated in paragraph 15 above in its statement of claim. It is clear therefore that the claim was specifically for tunnel hazards.

104. The arbitrators accepted the Petitioner's case that a claim for tunnel hazards under clause 50.2.5 of the Special Conditions of Contract was unsustainable. They rightly held that the procedure provided under clause 7.1 and 7.2 of the specifications for tunnelling were not followed. That the procedure was not followed was conceded by the Respondent as recorded in the award. The

arbitrators held in paragraph 7.5 of the award as follows :

> "7.5 After going through all the relevant provisions in the contract agreement and the facts brought out by the Claimant and the Respondent during their written and oral submissions, we find that this claim does not fall under "Tunnel Hazards" as the procedure laid down in the agreement was not followed by the Claimant. As such the Claimant's request for a mutually negotiated rate as provided under clause 50.2.5 can not be applied".

Thus, the claim as pleaded by the Respondent stood rejected and, if I may add, rightly so. Having come to this conclusion the arbitrators ought merely to have rejected the claim and nothing more.

105. The Respondent, realizing the sheer unsustainability of its claim, abandoned it for another as recorded in paragraph 7.2 of the award. The Respondents contended, without any pleadings, that it is actually a case of over-breaks. They further contended that the excessive over-break was due to the Petitioner having decided to do away with the lining of the tunnel in almost 90% of the length

and having kept it unlined or treated by guniting. The Respondent contended that they were therefore required to finish the excavated surface of the tunnel in such a manner that all intrusions were removed and that this was not expected by it at the time of submission of the tender.

106. This new plea could not have been entertained by the arbitrators as the parties had not submitted the same to arbitration. They had no jurisdiction to do so. No claim for over-breaks was made. In fact, the statement of claim indicates that the Respondent had deliberately sought to side-track the provisions of the contract under which it could have claimed over-breaks and sought to make a claim for tunnel hazards. The reason is not too far to see. Under clause 50.2.1 the rate payable for over-breaks is specified. It is clearly stated that for over-breaks beyond 10% there shall be no payment. Clause 50.2.2 reiterates this making it amply clear. There was therefore a bar to the payment for over-break beyond 10%. This is the obvious reason why the claimant made a claim for tunnel hazards. They however realised during the course of the arbitration that the claim for tunnel hazards would be unsustainable

for the reasons I have already mentioned. They therefore, before the arbitrators, sought to base their claim for over-breaks, a claim they had never made.

The arbitrators have not held or observed that it was a mistake in drafting. They had not held or observed that in sum and substance the claim as made in the statement of claim was actually for over-breaks and not for tunnel hazards. Indeed, all this was not even the Respondent’s case.

107. Despite the same, the learned arbitrators proceeded to adjudicate the matter as a case of over-breaks, a case which I have just observed, was not even pleaded. The award therefore deals with a dispute which was not even referred to the arbitrators. The arbitrators therefore had no jurisdiction to deal with the monetary claim contrary to the basis on which the claimant had made it.

108. The fact that in their written submissions the Petitioner may have dealt with this case is totally irrelevant. The arbitrators having permitted the Respondent to argue such a case and the fact that the

Respondent had referred to it in their written submissions, made it necessary for the Petitioner to respond to the same. That will not confer jurisdiction upon the arbitrators. To hold to the contrary would be grossly unfair to the Petitioner.

109. This is how the learned arbitrators dealt with the matter after having expressly rejected the Respondent's claim on the basis of which it was made:

> "However, we find that the Respondent has made deviations by not providing lining for most part of the tunnel and therefore the contractor was required to provide the smooth surface of the excavated tunnel profile. This could not have been envisaged by the contractor at the time of quoting his rates. Therefore we are convinced that he had to put in extra efforts by way of removing intrusions from the excavated surface of the tunnel. <u>This may be in our opinion the cause of excessive over breaks</u>. We are unable to appreciate that the excess over breaks are the result of the improper survey made by the contractors especially in view of the appreciation of the quality of the work accorded by the Respondents as is evident from para 2.7 above."

The subsequent part deals with the quantification

of the claim which is really irrelevant for the present purpose. The sentence I have emphasised above, in fact, indicates that the arbitrators had not even determined the cause of excessive over-breaks. The use of the word "may" adds to the fact that this issue was never before the arbitrators. The arbitral tribunal therefore decided a question not referred to it. This they could not have done (*Associated Engineering Company v. Government of Andhra Pradesh, A.I.R. 1992 Supreme Court, 232, paragraph 28*).

110. Mr.Chinoy sought to support the award on claim No.7 on the basis of the judgment of the Supreme Court in *Tarapore and Company versus Cochin Shipyard Ltd. Cochin (1984) 2 SCC, 680*. The learned arbitrators however clearly did not base their award either upon the judgment in *Tarapore's* case or upon the ratio thereof. The judgment of the Supreme Court would not apply to the facts of this case. I shall deal with the judgment in *Tarapore's* case in greater detail while dealing with the award in respect of claim No.8 (5). What I have observed qua *Tarapore's* case in respect of Claim No.8(5) applies equally to Claim No.7. Suffice it to state at this stage that

the fact situation which was the basis of the judgment in *Tarapore's* case was not even part of the reference before the learned arbitrators. In fact the claim as founded in the statement of claim was itself abandoned. The statement of claim was not even amended to refer a dispute of the nature that constituted the basis of the decision in *Tarapore's* case.

111. The judgment in *Tarapore's* case is therefore of no assistance to the Respondent. It did not form the basis of the Respondent's claim. The Respondent did not aver any facts or make any submissions of the nature dealt with by the Supreme Court in *Tarapore's* case. Indeed, at the cost of repitition, it must be noted that even the basis of the claim as pleaded in the statement of claim was abandoned. The matter therefore was not even referred to arbitration. The arbitrators therefore were neither called upon to nor decided the claim on the basis of *Tarapore's* case or on the basis of facts or principles of law similar thereto.

112. Mr.Chinoy had submitted that no ground had been made in the Petition challenging the award relating

to tunnel over-breaks and that the ground relied upon in the Petition viz. ground (q) was merely a general ground not adequate to entitle the Petitioner to challenge the award in this regard. He further submitted that the material facts regarding this ground of challenge have not been pleaded. He therefore submitted that the Petitioner was not entitled to challenge the award in respect of Claim No.7. The submission is unfounded.

113. The Petitioner had taken out a Notice of Motion being Notice of Motion No.1734 of 2004 for amendment of the Petition. I dismissed that Notice of Motion on the ground that if the amendments sought constituted a new challenge it was barred by limitation in view of the judgment of this Court in *Pushpa M. Mulchandani v. Admiral R. Tahiliani (2001) LJ Soft 74*. On the other hand, if it was covered by an existing ground or was merely an amplification of an existing ground, the Petitioner would be at liberty to urge the same. I had made it clear to the Respondent that they were at liberty to deal with this ground of challenge including by filing a further affidavit or fresh documents. The Respondent however did not choose to file any further

affidavit or documents. In ground (q) the Petitioner had expressly taken the ground that the arbitrators had while making the award ignored the mandate of the contract. It was further stated that the same amounted to re-writing the contractual terms which they had no power to do. The Respondent thereafter illustrated this contention by furnishing two examples. The examples pertained to Claim No.1 and Claim No.10. The illustrations were prefaced with the words : "This amounts to re-writing of contract terms which no Court has the power e.g." (emphasis supplied). It is thus clear that the challenge on this ground was not restricted to Claim No.1 and Claim No.10.

114. In the circumstances, these grounds formed the basis of the challenge in respect of all the claims. It was not necessary for the Petitioner in such circumstances to set out the claim numbers. Having challenged all the claims on this ground, it was again not mandatory for the Petitioner to press its challenge in respect of all claims. Indeed, in the affidavit in reply to the petition there is no grievance of ground (q) being vague. Nor was the Petitioners in any manner called upon to specify the

claims it intended to challenge. It often happens that various grounds are taken in pleadings, only some of which are finally pressed.

115. The Petitioner also expressly referred to the agreement, the award and the reference before the arbitrators. These documents read with the ground of challenge constitute all the material facts necessary to raise the challenge. It was not suggested by Mr.Chinoy that any other material facts were necessary. He based his entire argument on the fact that in ground (q) Claim No.7 was not specifically mentioned. This would be a hyper-technical view of the matter.

116. In the circumstances, the judgments in (i) *Union of India v. Popular Construction Co. : (2001) 8 SCC 470* (ii) *Pushpa M. Mulchandani v. Adiral R. Tahiliani : (2001) LJ Soft 74* and (iii) *Bijendra Nath Srivastava v. Mayank Srivastava & Ors. (1994) 6 SCC 117* relied upon by Mr.Chinoy are of no assistance to him. Nor does the reliance upon Rule 803C of the High Court (Original Side) Rules carry the matter further. The rule requires the material facts to be stated. As I have already held, the

material facts have been stated. The grievance that the Petitioner having failed to mention specifically Claim No.7 in ground (q) would deprive the Respondent of being given notice that the Petitioner would urge its challenge to the award in respect thereof is also of no substance for I had expressly permitted the Respondent to file further affidavits or documents, if they so desired, in respect thereof. They declined the offer.

The award in respect of Claim No.7 is therefore set aside.

RE. CLAIM NO.8 (5) :-

117. The Respondent claimed various amounts under the head of "operation of imported tunnel machines". The Petitioner supplied certain imported machines for tunnel excavation . The Respondent’s case was that various operational characteristics and requirements of the machines were not known to them and could not

be foreseen at the tendering stage, as a result whereof, the actual cost of operation was higher than provided for in the contract. The Respondent for this reason requested the Petitioner for various reliefs including an increase in the rate for tunnel excavation with imported machines. The Petitioner admitted these facts but granted only partial relief. The Respondent had no option but to accept the same to enable it to tide over its financial stringency. It was therefore the Respondent's case that its acceptance of the limited reliefs granted by the Respondent's letter dated 7th January, 1994 was not voluntarily acted upon but under compelling circumstances and under duress. It is in these circumstances that the Respondent signed the supplementary agreement dated 23.4.1994. The Respondent continued agitating its claim for various reliefs over and above those which were granted under the supplementary agreement.

I am at present concerned with only one of the items viz. item No.5 which reads as under :-

> "5. The unit rate of tunnel excavation with the use of the imported machines should be

> increased from Rs.245.10 per cum. (215x1.14) to Rs.615/- per cum as requested in letter 178/1/746 dated 06.08.1993 (Annexure 10). The amount claimed is 68,576 cum @ Rs.(615-245.1) = Rs.2,53,66,262/-."

118. There are various aspects which require consideration with respect to the challenge to the award in respect of this claim. I have set aside the award in the ultimate analysis as it is contrary to the provisions of the contract and based only on what the arbitrators perceived to be fair and equitable.

119. Mrs.Bagalia firstly contended that the claim pertained to an excepted matter and was therefore not arbitrable in view of Clause 37 read with 62 of the General Conditions of Contract. It was also contended that the Respondent had accepted unconditionally the subsidiary agreement and as such there was no case for increasing the rate in this regard. It was further contended that as per the supplementary agreement, it had already extended to the Petitioner various facilities which aggregated to a sum of Rs.90.50 per cum over and above the agreed rate of 245.10 per cum. The Petitioner disputed the quantum of Rs.615.00 per cum. claimed by the

Respondent. I have negatived all these contentions. I have however come to the conclusion that the award is contrary to the provisions of the contract and made without jurisdiction.

120. The first question that requires consideration is whether the claim was an excepted matter and therefore not arbitrable in view of clauses 37 and 62 of the General Conditions of Contract which read as under :-

> **"RATES FOR EXTRA ITEMS OF WORKS :**
>
> 37. Any item of work carried out by the Contractor on the instructions of the Engineer which is not included in the accepted Schedule of Rates shall be executed at the rates agreed upon between the Engineer and the Contractor before the execution of such items of work, and the Contractor shall be bound to notify the Engineer at least seven days before the necessity arises for the execution of such items of work that the accepted Schedule of Rates does not include a rate or rates for the extra work involved. In the event of no such agreement being arrived at,the Corporation shall be entitled to execute the extra works by other means and the Contractor shall have no claim for loss or damage that may result from such procedure. Provided always that if the

Contractor commences work or incurs any expenditure in regard thereto before the rates shall be determined as lastly hereintofore mentioned, then and in such a case the Contractor shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the date of determination of the rates as aforesaid, according to the rates as shall be fixed by the Engineer. However, if the Contractor is not satisfied with the decision of the Engineer in this respect he may appeal to the Chief Engineer, supported by an analysis of the rates claimed. The Chief Engineer’s decision after hearing out the position shall be final and binding on the Contractor and the Corporation." (emphasis supplied)

"MATTERS FINALLY DETERMINED BY THE CORPORATION :

62. All disputes or differences of any kind whatever arising out of or in connection with the contract, whether during the progress of the works or after their completion and whether before or after the determination of the contract,shall be referred by the Contractor to the Corporation and the Corporation shall within a reasonable time after the receipt of the Contractor’s representation make and notify decisions thereon in writing. The decisions, directions and certificates given and made by the Corporation, or by the Engineer on behalf of the Corporation, with respect to any matters decision of which is specially provided for by Clauses 17, 21.5, 37, 43 (a), 53.2,

> 60.2, and 61.1 (b) of these conditions (which mattes are referred to hereinafter as "excepted matters") shall be final and binding on the Contractor, provided further that "excepted matters" shall stand specifically excluded from the purview of the arbitration clause and shall not be referred to arbitration".

121. The Petitioner's submission is ex-facie unsustainable. Clause 37 no doubt is one of the excepted matters under clause 62. But, clause 37 only applies in respect of items of work carried out by the contractor which are not included in the schedule of rates. The Respondent rightly submitted that in the original bill of quantities, item 1 (i) provided for excavation with imported machines. The item under the column "Description of work" reads as under :-

> "(i) as imported machines and plants loaned by the Corporation vide Appendix "B" to Spl.Conditions of Contract".

The quantum was stated to be 1,28,000 cum. The basic rate per unit was stated to be Rs.215. The Respondent had agreed to carry out all the items of

work listed in the above Schedule at the basic rate indicated against each item plus 14%.

122. The learned arbitrators, therefore, rightly held that this item forms a part of the original work provided in the bill of quantities. They therefore further rightly held that the item cannot be termed as an extra item and is not an excepted matter under clauses 37 and 62. The view taken by the arbitrators cannot be faulted for any reason.

123. The second aspect pertains to the merits of this claim. It involves a consideration of five questions.

124 (a). The first question on merits, is whether the parties were aware at the time of invitation of tenders about the actual specifications and operating characteristics of the equipment imported by the Respondent.

(b). The arbitrators have held that it was clear from various documents that neither party was aware at the time of invitation of tenders about the actual specifications and operating characteristics of the

equipment imported by the Petitioner. This was an important aspect of the matter, for unless the same was established, the Respondent would not have been entitled to maintain its claim.

(c). This was essentially a question of fact. It is important to note that the finding of fact has not been challenged in the petition. The averments in the statement of claim that:

> "Various operational characteristics and requirements of the machines were not known, neither could be foreseen at the tendering stage and provided for in the contract, and the actual cost of operation was much higher than provided for in the contract."

were not denied by the Petitioner in its reply thereto. They were not denied in the correspondence which was referred to in the statement of claim and in the award. Nor was any attempt made before me to challenge this fact. There was no scope therefore for the Petitioner to deny the same.

125 (a). The second question that fell for consideration was whether the supplementary agreement

was entered into by the Respondent under compelling circumstances or under duress.

(b). The learned arbitrators considered the entire correspondence leading to the execution of the subsidiary agreement in the course of which the Respondents had asserted their right inter-alia in respect of this claim. The Petitioner, it has been observed, had conceded these demands to a certain extent. The same is evidenced by the subsidiary agreement. It is the Petitioner's own case that on this count, it in fact granted a package of reliefs to the Respondent. This aspect, therefore, is admitted. The only dispute is regarding quantification of the relief granted which is not material on this aspect of the matter.

(c). In this view of the matter, the learned arbitrators came to the conclusion that the Respondent had no choice but to accept the package as, if it had not agreed to the same, it had either to face termination of the contract for non-performance in accordance with the terms of the agreement or to continue to work under serious financial constraints which may have eventually

turned into total financial loss. In view of this, the learned arbitrators held that the subsidiary agreement was not executed by the Respondent voluntarily and was executed in compelling circumstances and under duress.

(d). This conclusion of the learned arbitrators is again one of fact after considering various documents on record. No fault can be found with this finding. This is not a case where the arbitrators have not given any reasons. It is well settled that the reasonableness of the reasons given by an arbitrator in making an award cannot be challenged. Even if on the same evidence some Court might have arrived at a different conclusion from the one arrived at by the arbitrators that by itself is no ground for setting aside the award of an arbitrator (See *U.P.Hotels v. U.P.State Electricity Board (1989) 1 SCC 359* paragraph 17.)

(e). Further, as Mr.Chinoy rightly pointed out, there is no ground challenging this finding of the arbitrators. Indeed, no serious attempt was made before me to challenge this finding of fact.

126 (a). There is an additional facet which relates to this question. Mrs.Bagalia submitted that the arbitrators had no jurisdiction to decide whether or not the subsidiary agreement was entered into under duress. She submitted that under Section 19-A of the Indian Contract Act, 1872, only a Civil Court can decide such an issue. Section 19-A of The Indian Contract Act reads as under :-

> **"19A. Power to set aside contract induced by undue influence.** - When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.
>
> . Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just." (emphasis supplied)

She based her submission in view of the words "*upon such terms and conditions as to the Court may seem just*". She submitted therefore, that Section 19-A of the Indian Contract Act confers jurisdiction and right to exercise the discretion only upon Civil Courts and not upon an arbitral tribunal.

(b). The submission is not well founded. There is nothing in Section 19-A of the Indian Contract Act to preclude the question from being determined by arbitration. The mere use of the term "Court" in section 19-A does not necessitate such an interpretation.

(c). For instance, Section 20 of the Specific Relief Act reads as under :-

> **"20. Discretion as to decreeing specific performance. -** (1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.
>
> (2) The following are cases in which the court may properly exercise discretion not to decree specific performance -
>
> .....
> (emphasis supplied)

(d). It has been held, both by this Court as well as the Supreme Court, that a dispute in respect of a claim for specific performance can be referred to

arbitration. In *(1999) 5 S.C.C., 651, Olympus Superstructures Pvt.Ltd versus Meena Vijay Khetan and Ors.*, the Supreme Court held as under :-

> "31. This point becomes relevant because if the arbitrators cannot grant specific performance, a point can be raised under Section 34(2)(b)(i) that the subject-matter of the dispute is not capable of arbitration.
>
> 32. One of the points raised in the grounds in this Court is that the grant of specific performance is discretionary and the discretion to grant or not to grant specific performance has been conferred by the Specific Relief Act, 1963 on the civil court and hence the arbitrator cannot be deemed to have been empowered to grant such a relief.
>
> 33. We may point out that the Punjab High Court in *Lakshmi Narain v. Raghbir Singh,* the Bombay High in *Fertiliser Corpn. of India v. Chemical Construction Corpn.* and the Calcutta High Court in *Keventer Agro Ltd. v. Seegram Comp. Ltd.* have taken the view that an arbitrator can grant specific performance of a contract relating to immovable property under an award. No doubt, the Delhi High Court in *P.N.B. Finance Ltd. v. Shital Prasad Jain* has however held that the arbitrator cannot grant specific performance. The question arises as to which view is correct.

34. In our opinion, the view taken by the Punjab, Bombay and Calcutta High Courts is the correct one and the view taken by the Delhi High Court is not correct. We are of the view that the right to specific performance of an agreement of sale deals with contractual rights and it is certainly open to the parties to agree - with a view to shorten litigation in regular courts - to refer the issues relating to specific performance to arbitration. There is no prohibition in the Specific Relief Act, 1963 that issues relating to specific performance of contract relating to immovable property cannot be referred to arbitration. Nor is there such a prohibition contained in the Arbitration and Conciliation Act, 1996 as contrasted with Section 15 of the English Arbitration Act, 1950 or Section 48(5)(b) of the English Arbitration Act, 1996 which contained a prohibition relating to specific performance of contracts concerning immovable property.

35. It is stated in *Halsbury's Laws of England,* 4th Edn., (Arbitration, Vol.2, para 503) as follows :

> "503. Nature of the dispute or difference. - The dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justifiable issue triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction (Cf.Bac

> Abr Arbitrament and Award A)".

Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (*Keir v. Leeman).* Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter *(Soilleux v. Herbst, Wilson v. Wilson and Cahill v. Cahill)*.

36. Further, as pointed out in the *Calcutta case* merely because there is need for exercise of discretion in case of specific performance, it cannot be said that only the civil court can exercise such a discretion. In the above case, Ms.Ruma Pal, J. observed :

> "... merely because the sections of the Specific Relief Act confer discretion on courts to grant specific performance of a contract does not mean that parties cannot agree that the discretion will be exercised by a forum of their choice. If the converse were true, then whenever a relief is

> dependent upon the exercise of discretion of a court by statute e.g. the grant of interest or costs, parties could be precluded from referring the dispute to arbitration."
>
> We agree with this reasoning. We hold on Point 3 that disputes relating to specific performance of a contract can be referred to arbitration and Section 34(2)(b)(i) is not attracted. We overrule the view of the Delhi High Court. Point 3 is decided in favour of the respondents."

(e). The observations of the Supreme Court apply with equal force to a case under section 19A of the Indian Contract Act. Agreements falling thereunder are not ipso-facto void. They are merely voidable. A party may therefore even choose not to avoid such an agreement. There is nothing in the Indian Contract Act that suggests that questions falling within the ambit of section 19A thereof are not arbitrable. Nor is there anything in the 1996 Act that suggests the same. In the circumstances, it must be held that the learned arbitrators had jurisdiction to decide whether or not the subsidiary agreement was entered into under duress.

127 (a). The third and an important aspect is

the consequence of the above findings. The arbitrators thus far found that neither party was aware at the time of invitation of tenders about the exact specifications and operating characteristics of the equipment imported by the Petitioner and that the subsidiary agreement was entered into under duress. The only basis on which the Petitioner could successfully defend the Respondent's claim was to establish that in these circumstances, the original contractual provisions would operate. This was in fact Mrs.Bagalia's submission. According to her if the subsidiary agreement is to be disregarded, then the only consequence would be that the parties would be relegated to their rights under the original agreement. In that event, the rate provided was Rs.245/- per cum. Admittedly, this rate and an additional amount under the subsidiary agreement has already been paid.

(b). Mrs.Bagalia's submission is well founded. This is the only logical consequence of the subsidiary agreement having been held to be non-est. Mr.Chinoy in fact did not dispute this conclusion. His attempt at supporting the award was on an altogether different basis which I shall deal

with shortly.

(c). The arbitrators then had no jurisdiction to make an award contrary to the terms of and the rate specified in the contract which was Rs.245/- per cum.

128. It is necessary now to see the basis on which the learned arbitrators awarded the claim. After dealing with the facts of the case, which I have referred to above, all that the arbitrators stated was :-

> "*We therefore feel that the issues raised by the claimant in this claim for* equitable and fair relief *deserves our due consideration" (emphasis supplied).*

This was the only basis on which the arbitrators thereafter proceeded to compute what according to them would be the "equitable and fair" quantum which they determined to be Rs.1,59,09,632/-. That the award cannot be sustained on this basis, is established by the judgment of the Supreme Court in *M/s.Alopi Parshad and Sons Ltd. versus Union of India, AIR 1960 Supreme Court 588.* (The judgment has

been followed and the relevant extracts therefrom have been cited in the subsequent decisions of the judgments which have been cited by the learned counsel before me.) The arbitrators are bound by the contractual provisions. It is not open to them to ignore the contractual provisions and award amounts of the basis of what they perceive to be equitable and fair de-hors the contract. This is well established by the judgments of the Supreme Court I have referred to earlier.

129. The learned arbitrators granted the award only on the basis of what they perceived to be equitable and fair. In *M/s.Alopi Parshad and Sons Ltd. versus Union of India,* the Supreme Court held in paragraphs 19, 20, 21 and 22 thus :-

> "(19). The original agreement dated May 3, 1937, was modified by the supplementary agreement dated June 20, 1942, and the arbitrators have held that the modified agreement was binding upon the Agents. By the agreement as modified, a graded scale was fixed for the establishment and the contingencies to be paid to the Agents, and also for the mandi charges and overhead expenses. The arbitrators still proceeded to award an additional amount for

establishment and contingencies and an additional amount for mandi charges. By cl.14(a), read with cl.12(b) (2) of the agreement, the rate at which establishment and contingency charges were to be paid, was expressly stipulated, and there is no dispute that the Government of India have paid to the Agents those charges at the stipulated rate for ghee actually purchased. The award of the arbitrators shows that the amount actually received from the Government, totalled Rs.6,04,700-9-0, whereas, according to the accounts maintained by the Agents, they had spent Rs.6,77,542-0-3. Granting that the Agents had incurred this additional expenditure under the head 'establishment and contingencies', when the contract expressly stipulated for payment of charges at rates specified therein, we fail to appreciate, on what ground, the arbitrators could ignore the express covenants between the parties, and award to the Agents amounts which the Union of India had not agreed to pay to the Agents. The award of the arbitrators, awarding additional expenses under the head of establishment and contingencies, together with interest thereon, is on the face of it erroneous.

(20) Before the arbitrators, a number of arhatias, who supplied ghee to the Agents, appeared and produced extracts from their books, showing the amounts actually due to them from the latter. Detailed charts, showing the total amount due under each head of expenditure to each arhatia, were produced. The

arbitrators were satisfied that the statements produced, reflected a general rise in prices and cost of labour. Taking into consideration the fact that the other persons were buying ghee at rates considerably in excess of the stipulated rates, the arbitrators held that the Agents were entitled to be reimbursed to the extent of Rs.11,27,965-11-3. But the terms of the contract, stipulating the rate at which the financing and overhead charges were to be paid under cl.13(a) read with cl.12(b), remained binding so long as the contract was not abandoned or altered by mutual agreement, and the arbitrators had no authority to award any amount in excess of the amount expressly stipulated to be paid. Mr.Chaterjee, on behalf of the Agents, submitted that the circumstances existing at the time when the terms of the contract were settled, were "entirely displaced" by reason of the commencement of hostilities in the Second World War,and the terms of the contract agreed upon in the light of circumstances existing in May, 1937, could not, in view of the turn of events which were never in the contemplation of the parties, remain binding upon the Agents. This argument is untrue in fact and unsupportable in law. The contract was modified on June 20, 1942, by mutual consent, and the modification was made nearly three years after the commencement of the hostilities. The Agents were fully aware of the altered circumstances at the date when the modified schedule for payment of overhead charges, contingencies and buying

remuneration, was agreed upon. Again, a contract is not frustrated merely because the circumstances in which the contract was made, are altered.

(21). Section 56 of the Indian Contract Act provides that :

. "A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

Performance of the contract had not become impossible or unlawful; the contract was in fact performed by the Agents, and they have received remuneration expressly stipulated to be paid therein. The Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity.

. "The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate - a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. <u>If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows</u>

that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at the point - not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation. When it is said that in such circumstances the court reaches a conclusion which is 'just and reasonable' (Lord Wright in Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd., 1942 AC 154 at p.186) or one 'which justice demands' (Lord Sumner in Hirji Mulji v. Cheong Yue Steamship Co. Ltd., (1926) AC 497 (510) this result is arrived at by putting a just construction upon the contract in accordance with an 'implication..... from the presumed common intention of the parties' : speech of Lord Simon in British Movietonews Ltd. v. London and District Cinemas Ltd. 1952 AC 166 at pp.185 and 186. (emphasis supplied)

(22). There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous. That is the law both in India and in England, and there is, in our opinion, no general rule to which recourse may be had, as contended by Mr.Chatterjee, relying upon which a party may ignore the express covenants on account of an uncontemplated turn of events since the date of the contract.

Mr.Chatterjee strenuously contended that in England, a rule has in recent years been evolved which did not attach to contracts the same sanctity which the earlier decisions had attached, and in support of his contention, he relied upon the observations made in British Movietonews Ltd. v. London and District Cinemas Ltd., 1951-1 KB 190 at p. 201. In that case, Denning, L.J., is reported to have observed :

> .....no matter that a contract is framed in words which taken literally or absolutely, cover what has happened, nevertheless, if the ensuing turn of events was so completely outside the contemplation of the parties that the court is satisfied that the parties, as reasonable people, cannot have intended that the contract should apply to the new situation, then the court will read the words of the contract in a qualified sense; it will restrict them to the circumstances contemplated by the parties; it will not apply them to the uncontemplated turn of events, but will do therein what is just and reasonable."

But the observations made by Denning, L. J., upon which reliance has been placed, proceeded substantially upon misapprehension of what was decided in Parkinson and Co. Ltd. v. Commissioners of Works, 1949-2 KB 632, on which the learned Lord Justice placed considerable reliance. The view taken by him was negatived in appeal to the House of Lords in the British Movietonews case - (1952) A.C. 166 - already referred to. In India, in the

> codified law of contracts, there is nothing which justifies the view that a change of circumstances, "completely outside the contemplation of parties" at the time when the contract was entered into, will justify a court, while holding the parties bound by the contract, in departing from the express terms thereof. 1949-2 KB 632 was a case in which on the true interpretation of a contract, it was held, though it was not so expressly provided, that the profits of a private contractor, who had entered into a contract with the Commissioners of Works to make certain building constructions and such other additional constructions as may be demanded by the latter, were restricted to a fixed amount only if the additional quantity of work did not substantially exceed in value a specified sum. The Court in that case held that a term must be implied in the contract that the Commissioners should not be entitled to require work materially in excess of the specified sum. In that case, the Court did not proceed upon any such general principle as was assumed by Denning, L.J., in 1951-1 KB 190."

Mr.Chinoy’s contention which I shall now deal with really is one which falls within the scope of the part that I have emphasised above. There are neither any facts pleaded, nor submissions made to the effect that for some reason the agreement in the present case ceased to bind the parties because on

its true construction it did not apply in that situation. The award in this respect must therefore be set aside on the basis of the ratio in *Alopi Parshad's* case.

130. Mr.Chinoy did not seriously attempt to support the reasonings of the learned arbitrators in this respect, to wit he did not contend that the Respondent was entitled to the amounts in these facts on the basis of their being "equitable and fair". Realising his difficulty, Mr.Chinoy sought to sustain the award on the basis of the judgment of the Supreme Court in *Tarapore's* case. He relied upon only a few observations of the Supreme Court in paragraph 38 of the judgment. It is necessary however, to deal with the judgment in greater detail as it forms the sole basis on which Mr.Chinoy sought to support the award in this respect.

131. It is important to note that in *Tarapore's* case, the Supreme Court proceeded on a particular fact situation. The Respondent invited tenders for construction of a dock. There were only two tenders in respect of a part of the work and in respect of another part of the work, the Petitioner was the only

tenderer. The value of the work was over Rs.24 crores. In view of the enormity of the work a tender committee was constituted which took note of the fact that works of such complexity and magnitude had not been undertaken before by any Indian contractor ; that the plant and equipment required for the work were not available indigenously and that the contractor was to procure specialised equipment required to execute the work. The Supreme Court noted that both the parties while entering into the contracts were aware and conscious of the fact that the equipment and technical know-how would have to be imported involving a huge outlay of foreign exchange. It was further noted that the Appellant was given to understand by the Respondents in the invitation to tender itself that the foreign exchange in yen credit to the tune of Rs.38 lacs was earmarked for the purchase of the equipment from Japan.

The construction commenced on 29th January, 1973. Admittedly, for reasons which are not relevant for the present purpose, the yen credit was not available. After a delay of about seven months, the equipment was obtained from Holland. During this period there was a drastic variation in the rate of

exchange and therefore the foreign exchange cost of the equipment and technical know-how as well as customs duty increased enormously. The Supreme Court noted that "a sort of an assurance was thus extended to the contractor that the amount of Rs.2 crores to be invested by the Appellant would be made available to it from the yen credit which ultimately was not available." At pages 710 and 711, the Supreme Court summed up the facts situation thus :-

> "It is thus unquestionably established that the appellant whose tender was accepted after negotiations and scrutiny by the Tender Committee was expected to invest Rs.2 crores in importing pile driving equipment and technical know-how fees. The tender was accepted and a formal contract was entered into on this basis. In works contract of such magnitude, the value whereof was over Rs.24 crores, and which was being undertaken by an Indian contractor for the first time negotiations prior to the finalisation of the contract and the correspondence leading to the formation of contract supply the basis on which contract was finally entered into. Undoubtedly, if in the final written contract, there is something contrary to the basic understanding during the formative stage of the contract, the written contract would prevail. But if the contract does not indicate to the contrary

and the assumptions appeared to be the foundation of the contract, obviously that aspect cannot be overlooked while determining what were the obligations undertaken under the formal contract. It may be recalled that the two alternative rates were quoted by the contractor ; (i) the respondent were to import the pile driving equipment and technical know-now for its operation, the same would be leased to the contractor at negotiated rates or (ii) the contractor were to import the same the rates to be paid to the contractor. The second alternative was accepted by the parties on the fundamental assumption that the investment in this behalf would be Rs.2 crores. This is the agreed position on which contract was entered into. To continue the narrative, it may be pointed out that this fundamental foundation of the contract was not left to guesswork, but is specifically referred to in the notice inviting tender and in the specifications and modifications as addenda to the General Conditions of Contract. It was clearly understood between the parties that the contractor has to invest roughly Rs.2 crores in foreign exchange for importing pile driving equipment and technical know-how fees without which this work could never have been undertaken and without which it would not have been entrusted to the contractor. The contractor when he quoted his terms must obviously have made appropriate calculations, one of which in this case appears to be that it will have to invest Rs.2 crores in foreign exchange and

> this fact flies in the face that after the work was over, the imported machinery would depreciate to this extent that it would have hardly any use or utility to the contractor as noticed by the Tender Committee. The rates quoted by the contractor were obviously interrelated to the basic assumption. The fact that such was also the understanding of the respondent may now be pointed out." (emphasis supplied)

At page 712, the Supreme Court reiterated that the parties were ad-idem about this fundamental basis on which the contract was entered into. What is even more important to note is that this was the accepted position between the parties. It is in this background that the Supreme Court made the observations in the last four sentences of paragraph 38 relied upon by Mr.Chinoy. In order to consider the judgment in its proper perspective it is necessary however to read paragraphs 37 and 38 in their entirety.

> "37. From the commencement i.e. from the stage of inviting tenders and through the negotiations and the finalisation of the contract, at every stage, the respondent assured that foreign exchange would be made available from Eleventh Yen

Credit. As the equipment was not available from Japan, the availability of Yen Credit became otiose from the contractor's point of view. At the instance of and with the active participation of the respondent, the contractor made equities in various countries and ultimately procured the necessary equipment and technical know-how which was approved by the respondent and imported the same. In the time lag, the price as well as the foreign exchange rates in relation to rupee underwent an upward change, with the result that the contractor had to invest, as made out by it and not seriously controverted before the arbitrator in all Rs.275.40 lacs for imported pile driving equipment and spares and Rs.18,64,337.61 on technical services-cum-know-how fees and a further sum for higher custom duty. Details of the claim have been set out in Annexures 1 and 2 respectively to the statement of claim submitted by the appellant to the arbitrator. The respondent in its counter-statement did not controvert the details of the claim and the expenditure involved under the two heads. The whole of the counter-claim was concerned with the denial of its liability to compensate the contractor coupled with the contention that the claim would not be covered by the arbitration agreement and therefore, the arbitrator had no jurisdiction to entertain and adjudicate the claim. It may also be mentioned that at no time since the award, the respondent ever disputed or questioned the amount awarded by the arbitrator. It is thus

satisfactorily established that the contractor had to invest something far in excess of Rs.2 crores which it was expected to invest in foreign exchange for imported pile driving equipment and technical know-how fees. The whole contract was concluded on this understanding.Being aware of the fluctuating position in this behalf, the contractor had tendered two alternative rates for completion of the work as pointed out earlier ; one based on equipment being imported by the respondent and leased to the appellant and alternatively rates on the basis that the contractor would import pile driving equipment and technical know-how. In respect of the second alternative, which was ultimately agreed to between the parties,it was clearly and unmistakably understood between the parties that the contractor would have to invest Rs.2 crores and the rates were co-related to this investment with the knowledge of the fact that when work was completed,the equipment would depreciate to the tune of 75 per cent of its capability and would be hardly of any use to the contractor.The estimated expenditure having far exceeded, a claim for compensation would certainly be tenable at the instance of the contractor.

38. The High Court quoted Clauses 16, 26 and 31 in its judgment but did not dilate upon the provisions of the clauses so as to co-relate them with its decision. Clause 16 envisaged a situation where since the formation of the contract any fresh law is enacted which has the bearing on the price of

materials incorporated in the works and/or wages of labour, the terms of contract shall accordingly be varied. Clause 26 provided for supply of materials, plants, tools, appliances etc. by the contractor. Clause 2 provides for the liability of the contractor to supply construction, plant and machinery including the items to be imported and a further obligation is cast on the contractor to furnish inventory of the same. Clause 31 amongst others, provided that the pile driving equipment shall be procured by the contractor, and the selection of equipment shall be done by the contractor, in consultation with the respondent. These clauses were presumably referred to in the context of an argument that the price escalation clause does not cover the claim for compensation for additional expenditure on imported plant and machinery and technical know-how because the contract substantially provides for the same to be supplied by the contractor. In our opinion, this over-simplification of the clauses of the contract involving works of such magnitude is impermissible. The whole gamut of discussions, negotiations and correspondence must be taken into consideration to arrive at a true meaning of what was agreed to between the parties. And in this case there is no room for doubt that the parties agreed that the investment of the contractor under this head would be Rs.2 crores and the tendered rates were predicated upon and co-related to this understanding. When an agreement is predicated upon an agreed fact situation, if

> the latter ceases to exist the agreement to that extent becomes irrelevant or otiose. The rates payable to the contractor were related to the investment of Rs.2 crores under this head by the contractor. Once the rates became irrelevant on account of circumstances beyond the control of the contractor, it was open to the contractor to make a claim for compensation. Therefore, it appears satisfactorily established that the claim arose while implementing the contract and in relation to the contract." (emphasis supplied).

132. The judgment of the Supreme Court in *Tarapore's* case was based on the fact situation established in that case. It is not that every change in the fact situation as contemplated by the parties during the formation of the contract gives rise to a claim. It would depend on the facts of each case. It would depend on the extent of the change. It would depend upon the intention of the parties to be gathered from all the facts and circumstances of the case. Such a case is a mixed one, of law and facts. It would necessitate a submission or reference to the arbitrators on all these questions. It cannot be decided afresh in a Petition under section 34.

133. No such case was even made out either in the statement of claim or otherwise. To leave no room for doubt, I went through the entire statement of claim. The Respondent did not even remotely suggest that the fact situation contemplated by it formed the fundamental basis of the contract. The Respondent did not suggest that the contract was predicate only on this basis. Nor had the Respondent suggested that the parties were ad-idem about the fundamental basis on which the contract was entered into. The Respondent did not suggest that in the event of a change in the fact situation contemplated by it regarding the operational characteristics of the imported machinery, it would not have entered into the contract. There is a suggestion to this effect in annexure 10 to the statement of claim. Significantly the pleading to that effect is not there in the statement of claim.

134. It is possible that the Respondent may have a good case in respect of its claim had the statement of claim considered various aspects which are absent therein. It is probable that the Respondents did not refer the most important aspect of its claim to the arbitrators. It is however equally possible that had

such a reference been made by the Respondent the Petitioner may have had a valid defence thereto. There is however no room for conjecture. The fact of the matter is that the basis on which Mr.Chinoy sought to support the award was totally absent in the reference before the arbitrators. The award relating to this claim must therefore be set aside.

135. The fourth aspect relates really to fixing a fair rate. There is a detailed discussion in the award regarding various rates which were placed before the arbitrators. It is not necessary to set out the same as ultimately the arbitrators accepted the rates derived by the Petitioner as they were of the view that the same were based on actual instances and were therefore, considered to be more realistic than the rates analysis supplied by the parties based on theoretical assumptions. They observed that no useful purpose would be served in going into theoretical assumptions and then arrive at the rate. This approach can hardly be faulted. It certainly cannot be interfered with in exercise of powers under section 34 of the 1996 Act.

136. The fifth and last aspect pertains to the

arbitrators, adding 25% towards the overheads and profits to the rate of Rs.406.47 per cum. This was on the finding that the Respondent had not added for overheads and profits which a contractor is entitled to. The rest was merely a matter of computation involving giving credit to the Petitioner for the original rate as well as the benefit granted by the Petitioner to the Respondent under the supplementary agreement. I may add over here that the rate arrived at by the learned arbitrators has not been challenged and indeed a challenge to the same would be unsustainable. I have already held that the original rates no longer applied. Logically therefore the 14% addition to the rate in the original contract also would no longer apply.

137. In the circumstances, the challenge to the award in respect of the said claim is upheld. The award in this respect is set aside.

RE. CLAIM NO.10 :

138. The Respondent, before the arbitrators,

contended that during the course of the work there was abnormal break-down of electric power at all three working points of the tunnel which disrupted the work excessively, and beyond any reasonable imagination. The effect of the break-down resulted in prolongation of the execution of the work that increased over heads and idle labour costs. The Respondent, therefore, claimed an amount of Rs.62,82,000/- together with interest.

139. Relying upon Clauses 10.4.1 and 10.4.8 of the Special Conditions of Contract the Petitioner contended that though it was to provide electric power at sub-stations, under clause 10.4 of Special Conditions of Contract, it was not responsible for any power failure, shut down, break-down etc. Clauses 10.4.1 and 10.4.8 read as under :-

> "10.4.1 The Corporation will provide LT three phase power supply at 415 Volts of 200 KVA at a distance of about 200 meters from both tunnel faces by availing of HT Supply either at 11KV or 22KV from the respective Electricity Board and by installing substations at these locations."
>
> "10.4.8. The Corporation do not hold themselves responsible for

> any power failure, power shut-down, break down of the substation equipment, etc. and the delay that may arise as a result of interruption to power supply. Contractors are advised to keep their own stand-by D.G. sets".

140. Once again as I intend setting aside the award in respect of this claim, it is but fair that I set out the relevant part of the award in detail. Paragraph 10.5 reads as under :-

> "10.5 It is clear from the provisions of the contract that the arrangement of taking connections to the Substation from the local Electricity Board was to be made by the Respondents. The claimant was to avail power supply from the Substations to be maintained by the Respondents. As such the Claimant was responsible only for maintenance of power supply onwards from the substations operated by the Respondents. The Claimant had no privity of contract with the Electricity Board and the Claimant had to rely on the efforts to be made by the Respondent, who was the customer of the Electricity Board. For power failures up to and including the local stations, the responsibility was squarely that of Respondent and the Electricity Board. Provisions in Clause 10.4.8 can not shift this responsibility to the Claimant as they had no agreement with the Electricity Board. It may also be stated that stand-by D.G. sets are to be provided to take

> care of emergencies for lighting or for de-watering but they can not substitute source of power supply that may be required to carry out operation of equipment. It is quite clear to us that the delay caused due to power failure or low voltage problems is not attributable to the Claimant. It was clearly attributable to the local Electricity Board, which had entered into an agreement with the Respondent and not with the Claimant."(emphasis supplied)

141. The entire portion of the award extracted above, except the emphasised sentence, contains a mere narration of facts. The emphasised sentence merely states that Clause 10.4.8 "*cannot shift the responsibility for supply of power upto and including the local sub-station to the claimants as they had no agreement with the Electricity Board.*" The question of shifting the responsibility did not arise at all. It was in fact irrelevant. The Petitioner did not contend that the Respondent was responsible for the same. All that it contended was that under clause 10.4.8 it was not responsible for the same. Thus the arbitrators had by no means attempted to even consider Clause 10.4.8 or the effect thereof.

142. Even assuming that the emphasised sentence is correct as a matter of fact viz. that Clause 10.4.8

cannot shift the responsibility for power failures upto and including the local sub-stations to the claimant, the arbitrators have failed to consider the effect of Clause 10.4.8 that expressly provides that the Petitioner is not responsible for the same either. Merely because the Respondent is not responsible for something, it does not necessarily follow that the claimant would be responsible for the same. The arbitrators were required to decide whether the Petitioner was or was not responsible for the power break-downs. They were not required or even called upon by either of the parties to decide whether there was any shifting of the responsibility under clause 10.4.8.

143. It is important to note that the award correctly does not state that the Petitioner is responsible for power break-downs because it was required to arrange the connection from the Electricity Board to the sub-station. Had this been stated it would have been patently absurd and contrary to clause 10.4.8 which is clearly to the contrary. The claimants are absolved from any responsibility on the express terms of the contract. The contract was thus not even sought to be construed

by the learned arbitrators. This is understandably so, because Clause 10.4.8 is not capable of two interpretations.

144. Once again the mere fact that the learned arbitrators noted the clause and the submission of the parties, it does not follow ipso-facto that they construed the contractual provision. The arbitrators clearly ignored the mandate of the contract.

In the circumstances, the award in this respect is set-aside.

145. I find in the written submissions tendered on behalf of the Petitioner a challenge to the award in respect of two other claims under the captions "Ventilation Ducts" and "Maintenance of the Road". Written submissions are for the assistance of the Court in respect of submissions made during the hearing. They are not to enable parties to add to such submissions. The award in respect of these claims was not challenged during the hearing. They cannot now be challenged in the written submissions.

146. The parties shall compute the amount due

under the award in accordance with this judgment.

The Petition is accordingly disposed off. There shall be no order as to costs.

Parties to act on an ordinary copy of this judgment duly authenticated by the Associate/Court Stenographer.